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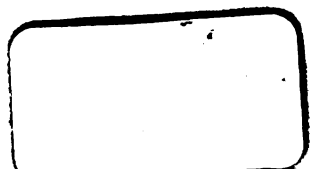
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# INTERNATIONAL ARBITRAL LAW AND PROCEDURE

BEING A RÉSUMÉ OF THE PROCEDURE AND PRACTICE  
OF INTERNATIONAL COMMISSIONS, AND INCLUD-  
ING THE VIEWS OF ARBITRATORS UPON  
QUESTIONS ARISING UNDER THE  
LAW OF NATIONS

BY

JACKSON H. RALSTON

LATE AMERICAN AGENT PIOUS FUND CASE; UMPIRE OF THE ITALIAN-  
VENEZUELAN CLAIMS COMMISSION; EDITOR OF "VENEZUELAN  
ARBITRATIONS OF 1903," "FRENCH-VENEZUELAN ARBI-  
TRATION UNDER PROTOCOL OF 1902," ETC.

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## PREFACE

A few words seem appropriate with regard to the design of the author in the preparation of this work.

Within the past hundred years there has grown up a body of law and procedure relating to the functions and operations of international arbitrations. The precedents creating this are to be found to a great extent in Moore's Digest of International Arbitrations to which the United States has been a Party, and as to ten commissions, in Venezuelan Arbitrations of 1903; which volumes are reasonably available to the inquirer, although the particular point as to which search may be made is not readily available, even in them, because of their bulk. However, an immense number of arbitrations have never been fully reported anywhere, and accounts of others are only to be found after a long search in out-of-the-way places, while the reports of many have been printed in extremely limited numbers.

It has seemed to the writer that, from the standpoint of both the diplomatist and the legal practitioner, the matters decided in all of these arbitrations should be put in a concise and convenient form, and one which at the same time would give sufficient information as to the international legal contests referred to, concerning which little has been published.

It has been the effort in this book to include not alone decisions specially relating to arbitral law and procedure, but also the opinions, upon points of international law, of the gentlemen who have taken part in the settlement of disputes among nations. It has appeared to the author that such opinions are worthy of special respect as being the result of acute legal examination and discussion, and that in themselves they furnish as precedents an important basis for the international law of the future.

It is true, as is repeatedly shown by decisions herein cited, that the doctrine of *stare decisis* is not accepted by arbitral commissions. Nevertheless, arbitral opinions will be continually found filled with references to the conclusions of other tribunals, as well as to the

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views of distinguished writers upon the subject of international law, and an arbitrator or umpire in his decisions will with hesitance reject the solemn findings of those who have theretofore in international commissions reached definite conclusions as to controverted points. Always will he rest easier knowing that in his opinions he is supported by those of predecessors of distinction, and should his final determinations be different, he will feel the necessity of supporting them by the most careful argument.

An examination of this work will demonstrate that a study of arbitral sentences and the reasons underlying them will furnish information and guidance upon many points as to which up to the present time the text writers are comparatively silent. For instance, we shall find discussed quite at large the significance of the so-called "Calvo Clause" in contract cases, a subject but little considered by the writers of works of international law. In other words, in this branch of legal science, as has often been the case in other branches, tribunals in their conclusions are in advance of the speculations of the scholars.

In the preparation of this work it has not been the purpose of the writer to exploit any particular theory or to indicate, save in rare instances, errors of law of which he has believed some commissions may have been guilty. It is rather to place before the reader all of the findings of arbitrators upon propositions presented to them, to the end that the student or practitioner may be informed relative to all points so far developed in discussions before international commissions.

The undersigned takes great pleasure in tendering his cordial thanks to Mr. Ellery C. Stowell, Editor of *Consular Cases and Opinions*, and to Mr. Clement L. Bouvé, of the District of Columbia bar, for valued assistance in the preparation of this volume.

JACKSON H. RALSTON

WASHINGTON, D. C.

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# INTERNATIONAL ARBITRAL LAW AND PROCEDURE

## CHAPTER I

### CHARACTERISTICS OF INTERNATIONAL LAW

1. The term "international law" has received consideration and definition at the hands of different commissions. This has been made necessary by the very nature of the work assigned them, as well as from, and especially because of, the fact that protocols have often declared that the decisions of commissions should be controlled by the principles of international law. That the terms "international law" and "public law" are equivalent was contended on the part of the United States with the apparent approval of the commission in the Dutrieux case (Boutwell's Report, 117; Moore, 3702). And the same commission held that only such claims were allowable as were recognized by international law and the usage of nations as just and equitable.

So likewise in the Van Bokkelen case (Moore, 1823) it was held that "for the interpretation of treaty language and intention, whenever controversy arises, reference must be had to the law of nations and to international jurisprudence."

In the Padrón case (Ven. Arb. of 1903, 925) the umpire of the Spanish-Venezuelan Commission quoted approvingly the remark of Calvo (Preface to the fifth edition) that "there exists no universal code applicable to questions and conflicts of every nature which arise between states. This absence of supreme law of common acceptance is the source of much hesitation among the publicists, of infinite contradictions in the jurisprudence and the practice of nations, of continued want of accord in international relations, which, not being obedient to clearly defined and fixed principles, sometimes partake more of an arbitrary character than of justice, more of force than of the action of law." The umpire continued, citing approvingly Boyd's Wheaton (Sec. 14, p. 22), that "international law, as understood among civilized nations, may be defined as consisting of those

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rules of conduct, which reason deduces, as consonant to justice, from the nature of the society existing among independent nations ; with such definitions and modifications as may be established by general consent." The umpire (Gutierrez-Otero) added that "it is unquestionable that this lack of a universal code common to all nations . . . impresses upon these principles and rules . . . the exclusive character of technical or scientific conclusions, rationally founded, capable of more or less contradiction, according to the force and clearness of their premises ; more or less firm according as they are immediately or mediately deduced, and more or less general, more or less subject to modifications and exceptions, according to the subject matter to which they refer."

Something of the same view with regard to international law was taken by Duffield, umpire of the German-Venezuelan Commission, in the Kummerow case (Ven. Arb. of 1903, 555), in holding that "international law is not law in its usually defined sense. It is not a rule of conduct prescribed by sovereign power. It is merely a body of rules established in custom or by treaty, by which the intercourse between civilized nations is governed. Its principles are ascertained by agreement of independent nations upon rules which they consider just and fair in regulating their dealings with each other in peace and in war. They reach this agreement by comparing the opinions of text writers and in precedents in modern times, and these ultimately appeal to the principles of natural reason and morality and common sense. It therefore rests solely upon agreement. Obedience to it is voluntary only and cannot be enforced by the common sovereign power. Any nation has the power and the right to dissent from a rule or principle of international law, even though it is accepted by all the other nations. Its obedience to the rule can only be compelled by an appeal to its reason and love of justice or by the superior force of the particular nation or nations whose interests are involved."

2. Other commissioners or umpires, however, have recognized international law as of even greater sanctity. Commissioner Frazer, in the Rio Grande cases (Hale's Report, 246) said :

The doctrine that this commission may, by its decisions, disregard the law of nations, in deference to whatever undefined notions of "equity and justice" the several members of the commission may happen to entertain from time to time, is to me a very great surprise. . . . What is the law of nations which it is insisted this commission may disregard? All definitions of it are in accord, substantially, and none of them better than Blackstone's, "That which regulates the conduct and mutual intercourse of independent states with each other by reason and natural justice." It is the natural law applied to nations in their relations with each other,

so far as they have consented that it shall be thus applied. It is wanting in some of the essentials of strict law, however; it is not prescribed by a common superior, and its only sanction is the public opinion of Christendom. Nor is it a complete code having an established rule for all questions that may arise. It is yet in the period of its growth; but whenever it does speak it utters the rule which the wisdom of the nations has by common consent found to be most in consonance with reason and natural justice. When it gives a rule for the government of a given case, it furnishes the full measure of international obligation in that case — is the only standard by which conduct in that case can be properly tested. In other words, it ascertains what is "equity and justice" between nations.

So in the Aroa Mines case (Ven. Arb. of 1903, 344, 386) umpire Plumley declared that "international law is not in terms invoked in these protocols, neither is it renounced. But in the judgment of the umpire, since it is a part of the law of the land of both governments, and since it is the only definitive rule between nations, it is the law of this tribunal interwoven in every line, word, and syllable of the protocols, defining their meaning, and illuminating the text; restraining, impelling, and directing every act thereunder. . . . Since this is an international tribunal established by the agreement of nations there can be no other law, in the opinion of the umpire, for its government than the law of nations; and it is, indeed, scarcely necessary to say that the protocols are to be interpreted and this tribunal governed by that law, for there is no other; and that justice and equity are invoked and are to be paramount is not in conflict with this position, for international law is assumed to conform to justice and to be inspired by the principles of equity." The learned umpire followed with many citations, indicating the foundation and character of international law.

Commissioner Bainbridge, in the Rudloff case (Ven. Arb. of 1903, 185; Morris's Report, 421), relied upon the fact that international law was defined by Hall (fourth edition, 1) to consist of "certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement," and this he considered to be the law governing his commission and "that paramount code which is obligatory upon" both nations represented in it.

## CHAPTER II

### TREATIES AND THEIR INTERPRETATION

3. "A treaty," says Plumley, umpire, in the case of the heirs of Jean Maninat (French-Venezuelan Commission of 1902, Ralston's Report, 44, 73), "is a solemn compact between nations. It possesses in ordinary the same essential qualities as a contract between individuals, enhanced by the weightier quality of the parties and by the greater magnitude of the subject matter. To be valid, it imports a mutual assent, and in order that there may be such mutual assent there must be a similar understanding of the several matters involved. It can never be what one party understands, but it always must be what both parties understood to be the matters agreed upon and what in fact was the agreement of the parties concerning the matters now in dispute."

"Treaties," it is said in the Aroa Mines case (Ven. Arb. of 1903, 344, 378), quoting the words of Chief Justice Marshall in the *Nereide* case (9 Cranch, 419), "are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion."

Again Plumley, umpire, in the case of the heirs of Jean Maninat, supra, said: "The language of the protocol is the work of skilled and erudite diplomatists. Every word is weighed and its force and significance are definite and certain. The language used in other protocols and its application by other tribunals are with them matters of common knowledge."

As indicating a like view we may refer to the Manica arbitration between England and Portugal (Moore, 5008), in which it was said that the interpretation of a protocol "must be supplemented by having recourse to the general principles of diplomatic interpretation."

4. A treaty, it is said, merges in itself all prior negotiations. Upon this point the umpire in the matter of the Chilean-Peruvian Accounts, quoting from Lawrence's Wheaton (sixth American edition, 318), says, "All mere verbal communications, — and by unavoidable corollary, written communications, — preceding the final signature of a written convention are considered as merged in the instrument itself." And



also, citing from Field's Outlines of an International Code, "All communications, written or verbal, between the parties to a treaty, preceding its signature, and relating to the subject thereof, are merged in the treaty." (Moore, 2092.)

Nevertheless, as we shall see, claims commissions have and exercise the right of examining carefully into all prior negotiations between the contracting parties for the purpose of determining the meaning and intent of the language of the treaty itself.

5. In at least two claims commissions it has been found necessary to declare in express terms that neither party could free itself from treaty obligations without the consent of the other. The umpire in the Van Bokkelen case (Moore, 1850), quoting Lorimer's Institutes of the Law of Nations (Vol. I, 44-45), says :

The value of treaties, as a source of the positive law of nations, is supposed to have been greatly enhanced by the annex to Protocol No. 1 of the conferences in London in 1871 respecting the clauses of the Treaty of Paris of 1856, which have reference to the neutralization of the Black Sea. The protocol is in the following words : " The plenipotentiaries recognize that it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement."

So in the King & Gracie cases (United States and Great Britain Claims Commission, 1853, 309; Moore, 4179), Upham, commissioner, speaking for the commission, said :

The first question arising for the consideration of the commission is, whether any legal bar on account of lapse of time exists against sustaining a claim for a return of duties. This seems now hardly to be contended for. Where a treaty is made between two independent powers, its stipulations cannot be deferred, modified, or impaired by the action of one party without the assent of the other. If the parties, by their joint act, have established no barrier in point of time to the prosecution of any claims under a treaty made by them, then neither country can interpose such limit. The case admits of no other judicial construction. The legal advisers of the crown concur in this view, and the commissioners have no doubt on the point.

6. Differences exist between the rulings of two arbitrators relative to the effect of treaties upon national laws, involving the discussion of a question of sharp interest of late arising out of the alleged rights of Japanese children to enter the public schools of San Francisco. Said Morse, arbitrator in the Van Bokkelen case (Moore, 1838):

They (the judicial tribunals of a country) will not impute to the plenipotentiaries in the negotiation of a treaty an intention which is in conflict with the fundamental law of the state. They will not lend their sanction to execute a treaty stipulation when it is in violation of the fundamental law of the jurisdiction; and they do this

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upon the ground that it is beyond the competency of the treaty-making power to enter into stipulations which are in conflict with the public law or the public policy of the jurisdiction.

And again in the same case (Moore, 1838), "The treaty-making power is necessarily and obviously subordinate to the fundamental laws and constitution of the state, and it cannot change the form of the government or annihilate its constitutional powers" (citing Story's Commentaries, Vol. III, Sec. 1508; Kent's Commentaries, Vol. I, 167, 287).

In the *Montijo* case (Moore, 1440), the umpire, Mr. Robert Bunch, said:

But it will probably be said that by the constitution of Colombia the federal power is prohibited from interfering in the domestic disturbances of the States, and that it cannot in justice be made accountable for acts which it has not the power, under the fundamental charter of the republic, to prevent or to punish. To this the undersigned will remark that in such a case a treaty is superior to the constitution, which latter must give way. The legislation of the republic must be adapted to the treaty, not the treaty to the laws. This constantly happens in engagements between separate and independent nations. For the purposes of carrying out the stipulations of a treaty, special laws are required. They are made *ad hoc*, even though they may extend to foreigners privileges and immunities which the subjects or citizens of one or both of the treaty-making powers do not enjoy at home.

It is to be noted, however, that in this case the contention of Colombia was in the teeth of that rule of international law which makes the national government responsible for the protection of foreigners irrespective of the details of internal legislation, whenever such responsibility naturally exists under the law of nations.

7. The question as to the survival of treaties in the event of a new country being formed by separation from the old arose before the Ecuadorian Claims Commission (Moore, 1574).

By Article 15 of the treaty between the United States and Spain of 1795, the principle of free ships free goods was established between those countries. At that time Colombia was a part of the Spanish Empire. It was contended, however, that by her subsequent declaration of independence she freed herself from the obligations which the treaty imposed on the Spanish nation. Mr. Hassaurek held [in the case of the *Mechanic*] that the United States had the right, under the circumstances, to expect that the Colombian cruisers and prize courts would respect the property covered by the American flag.

After citing several instances in which Ecuador, New Granada, and Venezuela, which formerly constituted the original republic of Colombia, had recognized Spain's treaties with foreign nations until they had substituted for such treaties, treaties of their own, Mr. Hassaurek decided that "Ecuador, having recognized and acted upon this

principle whenever advantage was to be derived from it, could not deny it when it imposed an obligation."

8. With regard to the time when treaties should be held operative as permitting the submission of claims for damages to commissions formed under them, we have to note that the Mexican-American Claims Commission of 1869 excluded all claims for transactions arising after the date of the exchange of ratifications (Moore, 1352), and in the *Massardo, Carbone & Co.* case (Ven. Arb. of 1903, 706), the umpire believed "it to be the duty of the commission to take jurisdiction over and grant judgment in all other cases originating at least before the date of the protocol where the evidence and the rules of international law justify such action." In the *French Company of Venezuelan Railroads*, French-Venezuelan Commission of 1902 (Ralston's Report, 367, 445), the umpire said :

For this honorable commission to order something to be done which would cause damage to the party obeying the order and then to award damages therefor would be opposed to the terms of the convention. It would be an independent act posterior to the convention, and were this to be done by the umpire it would require a payment by Venezuela to the claimant company for damages in fact suffered in the United States of America at the hands of the umpire.

9. That a treaty fixes the bounds of the jurisdiction of the international commission we show under the head of Commissions, and now refer only to the opinion of the umpire in the *Rudloff* case (Ven. Arb. of 1903, 192, 194 ; *Morris's Report*, 431), in which it was said that the protocol "is the fundamental law for this commission and the only source of its jurisdiction," and the *Stevenson* case (Ven. Arb. of 1903, 438, 451), in which the umpire said, "The umpire fails to find in the solemn covenant creating this tribunal any authority given it to pass upon any other than claims of British subjects." So in the *Van Bokkelen* case (Moore, 1822) the arbitrator said : "In a word, the protocol — which must be the guide and grant of jurisdiction for the referee — crystallizes and formulates the substantial grounds of past discussion and controversy in a single, definite issue, and furnishes the rule of decision."

10. The rules of interpretation in regard to treaties have received very considerable attention at the hands of the commissioners. In few cases have they been more largely considered than in that of *Van Bokkelen* (Moore, 1822), wherein, after having broadly stated that "for the interpretation of treaty language and intention, whenever controversy arises, reference must be had to the law of nations and to international jurisprudence," the arbitrator added (1837) :

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The judicial tribunals of a country, when called upon to decide controversies between individuals which grow out of or are dependent upon treaty stipulations, will not hesitate to construe the language of those treaties according to the rules of law which apply to all instruments. They will construe the provisions so as to give effect to rather than to defeat the intention of the contracting parties; and they will reconcile apparent conflicts of particular parts by reference to the context in which they occur and to the whole instrument.

He continued (1848), citing what was said of the Constitution of the United States by Mr. Justice Story, with the approval of Chancellor Kent (Kent's Commentaries, Vol. I, 243), and also other authorities :

The instrument furnishes essentially the means of its own interpretation.

The first and fundamental rule in the interpretation of all instruments is to construe them according to the sense of the terms and the intention of the parties. The intention of a law is to be gathered from the words, the context, the subject matter, the effects and consequence, or the reason and spirit of the law.

And the only case in which a literal meaning is not to be adopted is limited to the exception when such construction would involve a manifest absurdity.

When the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation. In literal interpretation the rule observed is to follow the sense in respect both of the words and construction of them which is agreeable to common use without attending to etymological fancies or grammatical refinements.

All international treaties are covenants *bona fide*, and are, therefore, to be equitably and not technically construed.

The principal rule has already been adverted to, namely, to follow the ordinary and usual acceptance, the plain and obvious meaning of the language employed. This rule is, in fact, inculcated as a cardinal maxim of interpretation equally by civilians and by writers on international law.

Vattel says that it is not allowable to interpret what has no need of interpretation. If the meaning be evident and the conclusion not absurd, you have no right to look beyond or beneath it, to alter or to add to it by conjecture. Wolf observes that to do so is to remove all certainty from human transactions.

Treaties are to be interpreted according to their plain sense.

Publicists are generally agreed in laying down certain rules of construction as being applicable when disagreement takes place between the parties to a treaty as to the meaning or intention of stipulations. Some of these rules are either unsafe in their application or of doubtful applicability; and rules tainted by any shade of doubt, from whatever source it may be derived, are unfit for use in international controversy.

Those against which no objection can be urged, and which are probably sufficient for all purposes, may be stated as follows :

When the language of a treaty, taken in the ordinary meaning of the words, yields a plain and reasonable sense, subject to the qualifications, that any words which may have a customary meaning in treaties differing from their common signification must be understood to have that meaning, and that a sense cannot be adopted which leads to an absurdity or to incompatibility of the contract with an accepted fundamental principle of law.

Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals, and these are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.

11. In the Aspinwall case (United States and Venezuelan Claims Commission of 1889, Report, 297, 306 ; Moore, 3616), extensive quotations were made from Vattel's chapter on Interpretation of Treaties (Book II, Chap. XVII), which embodied the following, believed by the commission "to be universally recognized as law" :

The first general maxim of interpretation is, that it is not allowable to interpret what has no need of interpretation. . . . In the interpretation of treaties, compacts, and promises we ought not to deviate from the common use of the language unless we have very strong reasons for it. In all human affairs where absolute certainty is not at hand to point out the way *we must take probability* for our guide. *In most cases it is extremely probable that the parties have expressed themselves conformably* to the established usage ; and such probability ever affords a strong presumption, which cannot be overruled but by a still stronger presumption to the contrary.

Words are only designed to express the thoughts ; thus the true signification of an expression in common use is the idea which custom has affixed to that expression. It is then a gross quibble to fix a particular sense to a word in order to elude the true sense of the entire expression. Says Grotius : " If there is no conjecture which leads another way, words are to be understood from their propriety, not in the grammatical sense springing from their origin, but according to their popular sense " (De Jure Belli ac Pacis, Book II, Chap. XVI).

Judge Little continues :

It is laid down, it is true, by recognized authority that where language is employed in a treaty which is susceptible of two meanings, that is to be preferred which is least for the advantage of the party for whose benefit the clause is inserted. For in securing a benefit he ought to express himself clearly. (Woolsey's International Law, 113.)

The same rule of international law is referred to approvingly in the Sambiaggio case (Ven. Arb. of 1903, 689), where the umpire to like effect quotes Wharton's Digest (133) as follows : " If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by party accepting it," the umpire following with a citation from Pradier-Fodéré (Droit International Public, 1188) : " Modern authors recognize that doubtful stipulations should be interpreted in the least onerous sense for the party obligated." (This rule of interpretation was recognized and followed in the Maninat case, Ralston's Report, French-Venezuelan

Claims Commission of 1902, 44.) In the Sambiaggio case the umpire cites Vattel (Book II, Sec. 264): "If he who could and should express himself clearly and fully has not done it, so much the worse for him. He cannot be received subsequently to bring forward restrictions which he has not expressed." The umpire believed, "if it had been the contract between Italy and Venezuela, understood and consented to by both, that the latter should be held for the acts of revolutionists — something in derogation of the general principles of international law — this agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation."

It is noteworthy, however, that the umpire of the German-Venezuelan Commission, sitting at the same time, applied the rule just cited from Vattel to justify a quite different conclusion from that reached in the Sambiaggio case (Kummerow case, Ven. Arb. of 1903, 556).

In the Aspinwall case, above referred to, the commission adopted as a proper rule of interpretation that indicated by Mr. Justice Story in *Shanks vs. Dupont* (3 Peters, 249): "If a treaty admits of two interpretations, and one is limited and the other liberal, one which will further and the other exclude private rights, why should not the most liberal exposition be adopted?" This rule of the Supreme Court as to the interpretation of treaties was also quoted by the umpire in the Kummerow case just referred to.

In the Kummerow case, *supra*, the rule of the Supreme Court that "where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred" (*Hauenstein vs. Lynham*, 100 U. S. 483), was repeated. In following this rule of the Supreme Court the umpire reiterated the acceptance of the Supreme Court rule given by the United States and Venezuelan Claims Commission of 1889, in the Aspinwall case. However, that the restrictive interpretation should be given to treaties as applying to powers conferred by them upon commissions appears in the case of the heirs of Jean Maninat (French-Venezuelan Commission of 1902, 44, 72), the umpire saying:

The restrictive interpretation given by the umpire in this opinion follows a well-defined and quite generally constant line of decision by arbitral tribunals whenever the question has been raised and the terms of the convention were in spirit similar. It follows, that if a different rule had been desired by the high contracting parties, they would have employed words susceptible of a different interpretation.

12. In the case of the schooner *Washington* (United States and Great Britain Claims Commission of 1853, 173; Moore, 4342), Bates, umpire, reaching a like conclusion, Commissioner Upham said :

"It is an established rule," says Chancellor Kent, "in the exposition of statutes" and the same rule, I may add, applies to treaties, "that the intention of the lawgiver is to be deduced from a view of the whole and of every part of a statute, taken and compared together, and the real intention, when accurately ascertained, will always prevail over the literal sense of the terms." He further says, "When the words are not explicit, the intention is to be collected from the occasion and necessity of the law, from the mischief felt, and the remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion." (Kent's Commentaries, Vol. I, 462.)

Now there are various circumstances to be considered in connection with the treaty that will aid us in coming to a correct conclusion as to its intent and meaning. These circumstances are the entire history of the fisheries; the views expressed by the negotiators of the treaty of 1818, as to the object to be effected by it; the subsequent practical construction of the treaty for many years; the construction given to a similar article in the treaty of 1783; the evident meaning to be gained from the whole article taken together; and from the term "coasts" as used in the treaty of 1818 and other treaties in reference to this subject.

13. In the Costa Rica Claims Commission (Moore, 1564-1565) the rule of Vattel was stated that neither the one nor the other of the parties interested in the contract has a right to interpret the deed or treaty according to his own fancy (Chap. XVII, 265). (This rule was also recognized in the Van Bokkelen case, Moore, 1823.) Vattel's rule further cited by the commission reads as follows :

It is not to be presumed, that sensible persons in treating together, or transacting any other serious business, mean that the result of their proceedings should prove a mere nullity. The interpretation, therefore, which would render a treaty null and inefficient cannot be admitted. It must be interpreted in a manner that it should not be vain and illusory.

14. An extensive summary of the rules of interpretation of treaties, likening them to statutes, and citing numerous authorities, is to be found in the Aroa Mines case (Ven. Arb. of 1903, 352). Some of the rules not already touched upon may be summarized as follows : The intention of the parties is the pole star of construction. Where two constructions are possible, that would be adopted which equity would favor. Where words have two senses, of which one is agreeable to the law, that one must prevail. Construction is to be had against claims or contracts which are in themselves against common right or common law. All parts will be construed, if possible, so as to have effect.

The umpire cited approvingly authorities holding that "when there is a latent ambiguity which arises only in the application and does not appear upon the face of the instrument it may be supplied by other proof"; that "the journals of a legislature may be referred to if the meaning of a statute is doubtful or badly expressed"; that "there must always be reference to the surrounding circumstances and the object the parties intended to accomplish."

To like effect is the opinion of Upham, commissioner, in the Schooner *Washington* case (United States and Great Britain Claims Commission of 1853, 176), holding that a practice for thirty-five years had determined what classes of bays and creeks were meant by the treaty of 1783. The umpire, using different argument, reached a like conclusion. (Moore, 4342.)

In the line of the citation just given it was held in the Betancourt case (Ven. Arb. of 1903, 939) that the circumstances attending the signing of a treaty may be examined into, and the same practice was followed in the Sambiaggio case (Ven. Arb. of 1903, 666). In the decision of the king of Sweden with reference to the Samoan dispute (Foreign Relations, 1902, 444), he referred to the protocols of the conferences leading up to the treaty in order to interpret it. In the Kummerow case (Ven. Arb. of 1903, 526) it was laid down as a uniform rule of construction that effect should be given to every clause and sentence of the agreement.

15. A decision of interest upon questions of interpretation is to be found in the Sambiaggio case (Ven. Arb. of 1903, 666) already referred to. In that case the umpire held that in arriving at a correct interpretation it was necessary to consider the exact point of controversy at the time the treaty was signed, and so doing it was not conceivable that Venezuela by the protocol should have admitted liability for a large class of claims never contended for by Italy when Italy's demand had relation to a principle denied by Venezuelan laws and constitution, and which had been the subject matter of discussion.

16. Sustaining the theory that treaties should not be given a retroactive interpretation unless in terms requiring it, the umpire in the Sambiaggio case, *supra*, held that "treaties are to be interpreted, generally, *mutatis mutandis*, as are statutes (Wharton's Digest, Sec. 133), and on many occasions the Supreme Court of the United States has held that in the absence of express language statutes will not be held to be retroactive. In one of the most recent cases brought before that tribunal it was held that 'a statute should not be construed to act



retroactively, or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction.' ” (City R. R. Co. *vs.* Citizens' Street R. R. Co., 166 U. S. 557.)

17. The opinion of the American members of the Alaskan Boundary Commission (Senate Document 165, 58th Congress, 2d session, 48) is of some value as referring by inference to certain rules of interpretation, they saying, referring to a given construction :

1. The purpose of the treaty, well understood by the negotiators, would be accomplished by this construction, and would be defeated by the other construction.

2. The natural and ordinary meaning of the terms used in the treaty, when applied to the natural features of the country known to the negotiators, or supposed by them to exist, require this construction.

3. The meaning expressly given to the words used in the treaty by the negotiators, in their written communications during the course of the negotiations, requires this construction.

It is to be noted that in this case the United States arbitrators placed great reliance upon the circumstances surrounding the signing of the treaty they were called upon to interpret, as well as upon the official maps used by the countries in interest, and a long course of dealing which constituted a practical interpretation by all parties concerned.

In the Kummerow case, *supra*, it was held that regard must be had to the situation of the contracting parties and the correspondence preceding the execution of the protocol.

18. As is manifest from all of the foregoing, the intention of the parties must rule, and the principles laid down are after all but means of determining, as scientifically as the subject will permit, what the parties' intentions may have been ; and so we find that the language in the Manica arbitration above referred to (Moore, 5011), that “ a contract must be taken in the sense most in accordance with the intentions of the parties who have arranged it and the most favorable to the aim of the contract,” is but a summing up of the purpose of all interpretations, almost trite in its terms.

In the same case it was held that the interpretation of the protocol should be supplemented by having recourse to the general principles of diplomatic interpretation, according to which when in a delimitation convention it is said that a line is to go from one point to another, without specifying the course, it must proceed there directly by the shortest route.

19. The meaning of the “ most favored nation ” clause seems only to have received extended consideration in the Sambiaggio case (Ven. Arb. of 1903, 666). In discussing this case the Italian com-

missioner strongly urged upon the umpire that, one umpire having decided that the nationals claiming before him were entitled to awards for damages inflicted by unsuccessful revolutionists, it was the duty of the umpire of the Italian-Venezuelan Commission — the Venezuelan protocol of February 13, 1903, assuring to Italians the treatment accorded the most favored nation — to grant to the claimants a like advantage. The umpire maintained that the clause in question referred necessarily "to the treatment to be accorded citizens and subjects by general and permanent rules between nations, and not to momentary rules of decision controlling the disposition of claims arising out of past events. Rules for the settlement of prior disputes, which die with the commission acting under them, accord nothing partaking of 'favored nation' treatment. . . . If the idea presented by the Honorable Commissioner for Italy were to prevail, would not inextricable confusion result? Must the umpire of the Italian-Venezuelan Commission withhold his decision on a particular case until another commission decide it, and follow the views then expressed? If he decide a certain proposition against Italy, and any other commission thereafter give a more favorable decision, must he, in subsequent cases, abandon his opinions despite his solemn declaration at the formation of this commission, or must he insist upon them, notwithstanding that the commission primarily charged with the interpretation of the other protocol be of a different opinion?"

Shortly after the same question was again raised before the same umpire in the Guastini case (Ven. Arb. of 1903, 730). In this the umpire found occasion to say that "it is true that there have existed differences of opinion among umpires as to the responsibility of Venezuela for acts of unsuccessful revolutionists; but such differences of opinion, relating as they do to questions of international law or of the construction of protocols, cannot be said to have any relation to a 'most favored nation' clause obligatory upon Venezuela, which nation has apparently given Italy all she promised. These opinions may be studied to advantage, but they are not protocols, nor are they 'treatment,' within the meaning of the Italian-Venezuelan agreement."

20. It remains for us to consider certain special cases of interpretation which have received the attention of commissions.

In the Fabiani case, French-Venezuelan Claims Commission of 1902 (Ralston's Report, 81, 133), it was held that "from the time her intervention began it was undoubtedly the constant purpose of France to remove as quickly and as effectually as possible this occasion of international dissension. It is not to be believed that France

would consent to submit to arbitration a part only of a national's claim, leaving large and important portions of it undisposed of and to be still matters of international intervention."

In the case of William Cook before the United States and British Claims Commission of 1853 (Report, 169; Moore, 2315), Upham, commissioner, speaking for the commission, said :

It may be conceded that the claim comes nominally within the letter of the convention. This, however, does not settle the question of jurisdiction. It is quite clear we may go beyond its terms to the consideration of the various classes of cases embraced in ordinary international controversies; and if any class of claims has not been heretofore regarded as matter of international adjustment, we are not necessarily bound to regard them as included within the provisions of the convention.

In the Rivas case (Moore, 3780) it was urged that under the treaty of 1795 between the United States and Spain, Spain could invest the government of Cuba with extraordinary and discretionary powers, permitting even the embargo of real property; that such powers were vested, and constituted the regular course of proceedings in the Island of Cuba, and applied to Spaniards as well as to foreigners. The American arbitrator said :

In my view this law is not such a law as was intended by the seventh section of the treaty of 1795. By that treaty Spain agreed in effect to proceed against the property of American citizens for offenses defined by law, for penalties imposed by law, and by a regular course of judicial proceedings. A law which vests in the governor-general the powers to define offenses, affix penalties, and to proceed summarily or administratively does not seem to me to meet the requirements of the treaty.

The umpire, Count Lewenhaupt, concurred in this opinion.

In the Kenworthy case (United States and Great Britain Claims Commission of 1853, 334) Upham, commissioner, speaking for the commission, said :

The convention of July 3, 1815, to regulate commerce between the territories of the United States and of Great Britain, provides, in article 1st, "that the inhabitants of the two countries, respectively, shall have liberty to remain and reside in any part of the territories of the other, where other foreigners are permitted to come; also to hire and occupy houses and warehouses, for the purposes of their commerce; and generally, that the merchants of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but *subject always to the laws and statutes of the two countries, respectively.*"

Consequent upon this he held that the citizens or subjects of either government resident in the other, engaged in commerce, should be

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subject to the laws of the country where they resided in all matters pertaining to such commerce. " The adjudication of suits arising out of the collection of the revenue is certainly a matter of local jurisdiction by the courts of the country, and there can be no appeal from them to this tribunal."

In the Corcuera case (Ven. Arb. of 1903, 936) an order had been passed recognizing the debt due the claimant and directing him to be paid by the Minister of War. Shortly thereafter a convention was had between Venezuela and Spain by which all Spanish claims then pending were canceled. The umpire considered that the prior recognition had constituted the claim a portion of the public debt of Venezuela, and it was not intended to be canceled by the treaty. A like ruling was made in the Betancourt case (Ven. Arb. of 1903, 939).

## CHAPTER III

### COMMISSIONS

#### MANNER OF THEIR FORMATION

21. Mixed tribunals, as their name would indicate, are formed of one or more representatives of each of the contending powers, usually, but not uniformly, presided over by a citizen or subject of a neutral state. In some of the earlier commissions, as for instance that under the seventh article of the Jay Treaty, the umpire was selected by lot, the choice falling upon an American. In the British-American Mixed Commission of 1853 a gentleman, American born but having long resided in London, was chosen by all the commissioners as the third member. In other cases alternate umpires have been selected, being the choice of the commissioners from the respective nations. Of late, however, in commissions of this description, the selection of the umpire has been usually left to the chief magistrate of some neutral state, agreed upon in the protocol.

A distinction is to be noted, although not always followed in strict nomenclature, between protocols providing for the selection of a third or fifth man, as the case may be, who, like his fellows, has the functions of an arbitrator, and the selection of a man who is in point of fact an umpire, although sometimes presiding. The Hague conventions refer specifically, in the absence of other agreement, to the fifth man as being the umpire (*sur-arbitre*), although in point of fact the man so chosen is simply the president, with powers otherwise like those of his fellow members.

The Venezuelan protocols of 1903 provided for the appointment of an umpire properly so called, for, although he had the power to preside when present at meetings of the commission, he did not vote nor exercise any control over the questions arising or claims presented before the commission, except upon differences of opinion existing between the commissioners and duly referred to him.

Certain large and important mixed commissions, like the Alabama Commission and the Fur Seal Commission, have presented the rather unusual condition of having among the commissioners appointed by

joint agreement citizens or subjects of the contending parties and citizens or subjects of other nations, whose appointment by their respective chief magistrates was authorized by the protocol, and all of whom, upon meeting, joined in the selection of the presiding officer from their number, whose functions otherwise were those of any other member of the commission.

An unusual condition existed in the British-Venezuelan Commission to settle the boundaries of Venezuela and British Guiana, in that though England was directly represented on the tribunal Venezuela was not, the United States taking its place.

Certain mixed commissions, like the Alaska Boundary Commission, have been also exceptional in their method of formation, in that they have consisted of an equal number of representatives of the contending nations, presided over by one of their number, but without outside aid or intervention.

In many of the disputes referred to in this volume reference was had to the chief magistrate of a neutral power, who, in determining the question at issue, called to his assistance his advisers, although himself responsible for the arbitral award. In one case—a dispute between France and Nicaragua—the French Court of Cassation was empowered to decide the difficulty.

22. By special clauses of the protocols in three cases referred to the Hague—those of the Pious Fund, the Mascate, and the Venezuelan Preferential Question—it was expressly provided that no national of the contending nations should be chosen as a member of the court, and it is to be noted that in these three cases a unanimous award was agreed upon, whereas in the Japanese House Tax case, in which nationals were permitted to sit, a vigorous dissent was made by the Japanese arbitrator from the decision of his two associates.

23. Where reference is made to the chief magistrate of a country, who dies before his work is completed, his successor in office is recognized as having the right to fulfill his duties. Thus upon the decease of Alphonso XII, king of Spain, the queen regent became arbitrator in the boundary conflict between Colombia and Venezuela in 1899. M. Émile Loubet, president of France, performed the arbitral functions between Colombia and Costa Rica confided to his predecessor in office, M. Félix Faure.

24. An imperfection seems to exist alike in the general practice of tribunals and in the Hague conventions, in that no provision whatsoever is made for challenging either arbitrators or umpires

because of unfitness, personal prejudice, or interest in the subject matter or otherwise. It is believed, however, that with the growth of the science, this defect will be remedied, to the end that the most absolute moral force and effect may be given to the findings of commissions.

25. It is ordinarily provided in the protocols that the commissioners upon their meeting shall sign an oath or declaration with reference to the manner in which they shall perform their duties, and, as we shall see, this declaration, the terms of which are often set out in the protocol itself, is of special importance from time to time in controlling the conclusions of the arbitrators or umpires signing it.

#### LIMITATION OF POWERS

26. A tribunal of arbitration is a tribunal of special and limited powers, and although it has the right, as we shall see, to pass upon its own jurisdiction, its powers are limited by the terms of the protocol, and it may only decide matters before it, in the absence at least of special provisions, "upon the basis of international treaties and the principles of international law." (Pious Fund Award, Agent's Report, 17.)

So also in the case of the French Company of Venezuelan Railroads, French-Venezuelan Claims Commission of 1902 (Ralston's Report, 367, 444), Plumley, umpire, said :

The limits of this honorable commission are found and only found in the instrument which created it, the protocol of February 19, 1902. An arbitral tribunal is one of large and exclusive powers within its prescribed limits, but it is as impotent as a morning mist when it is outside these limits. A reference to the convention which created this commission will disclose its purpose and purview. . . . The sole scope and sweep of the authority given is to provide indemnities for damages suffered by Frenchmen in Venezuela. It is not defined but it is assumed that its methods of procedure will not contravene the general and established principles of the law of nations, nor its awards be opposed to justice and equity. This much can be assumed, but to assume that it has power to revoke, rescind, modify, or limit the terms of a contract, even so much as by a hair's breadth, is impossible. It was created for no such purpose; it was endowed with no such powers. So far as a Frenchman has suffered damages in Venezuela for which Venezuela is responsible, the indemnities may be stated, and the decision be final. The arbitral tribunal thus constituted may, as a means to an end provided, ascertain and declare the responsibility of Venezuela, it may pass upon its own jurisdiction within the scope of its charter, but it cannot step in the least outside the path prepared for it, which is and only is the path which leads from damages to indemnities.

Similarly the same umpire, in the same commission (Ralston's Report, 445), held :

It is always and only on the basis of indemnities for damages that this honorable commission has jurisdiction, and it is utterly powerless, even for good cause, to decree an unaccepted and unacceptable abandonment by either party of a mutual and reciprocal contract, or to award an act of rescission which has not, in effect, previously taken place.

And thus expressing his opinion, umpire Plumley but followed the precedent set by himself, in which he held (Stevenson case, Ven. Arb. of 1903, 438, 451) that "an arbitral tribunal between nations is one of great power within the terms of its creation, but absolutely powerless outside thereof. Nothing can be within its terms except such as is there by the clear and express agreement of the high contracting parties."

In the Postal Treaty case, before the Italian-Venezuelan Commission (Ven. Arb. of 1903, 665), the umpire said : "It is to be borne in mind that claimants presenting themselves before this commission appear before a body of limited powers, and are to be regarded as accepting its drawbacks in consideration of anticipated benefits."

As Sir Edward Fry said in the Pious Fund case, referring to the protocol (Agent's Report, 513), "This is the code."

In the case of William Cook et al. before the British-American Commission of 1853 (Report, 166 ; Moore, 2315), it was said :

It may be conceded that the claim comes nominally within the letter of the convention. This, however, does not settle the question of jurisdiction. It is quite clear we may go beyond its terms to the consideration of the various classes of cases embraced in ordinary international controversies ; and if any class of claims has not been heretofore regarded as matter of international adjustment, we are not necessarily bound to regard them as included within the provisions of the convention. . . . The claim comes before us, then, in altogether an unwonted position ; and we are fully of the opinion that it is not of the class of cases designed to be embraced within the convention, and that we have no jurisdiction over it.

The claim was for property said to have been held in trust by the British crown.

27. Nor may an arbitrator assume the functions of a mediator, as, in the judgment of the United States, was attempted by the king of the Netherlands in the case of the Northeastern Boundary (Moore, 137). To his action the objection was made that the proceedings of the arbitrator constituted a departure from his powers. As the result, Great Britain and the United States mutually waived the award.



As expressed by Baron Lambermont in a letter to the German and English ministers in connection with an award made by him (Moore, 4946), "Arbitrator and not mediator, I had only to give the law and could not enter into the domain of bargaining."

Arbitrators have, however, felt at liberty to make recommendations in connection with the subject matter with which they were dealing, as we shall hereafter see (Secs. 152, 153, and 154).

#### RIGHT TO PASS UPON THEIR OWN JURISDICTION

28. The question as to the right of an international commission to pass upon its own jurisdiction received consideration in connection with the commission formed under the seventh article of the Jay Treaty, in the case of the *Betsey*. The British commissioners denied the jurisdiction of the board on the ground that the Lords Commissioners of Appeal had rendered a decision in the case, and that this decision must be considered as final. The American commissioners, Messrs. Gore and Pinkney, and the fifth commissioner, Mr. Trumbull, maintained the opposite view. The opinions of Messrs. Gore and Pinkney are given quite at length in Moore, commencing at page 2278. Mr. Gore held:

A power to decide whether a claim preferred to this board is within its jurisdiction, appears to me inherent in its very constitution, and indispensably necessary to the discharge of any of its duties. . . . To decide on the justice of the claim, it is absolutely necessary to decide whether it is a case described in the article. It is the first quality to be sought for in the examination. To say that power is given to decide on the justice of the claim, and according to all the merits of the case, and yet no power to decide or examine if the claim has any justice, any merit even sufficient to be the subject of consideration, is to offer in terms a substance, in truth a phantom. . . .

To my mind there can be no greater absurdity than to conceive that these two nations appointed commissioners with power to examine and decide claims; prescribed the rules by which they were to examine them; authorized them for this purpose to receive books, papers and testimony, examine persons on oath, award sums of money and solemnly pledge their faith to each other, that the award should be final and conclusive, both as to the justice of the claim and to the amount of the sum to be paid, and yet gave them no power to decide whether there was any claim in question. . . . It is a contradiction in terms to say that a measure adopted shall terminate all differences, and yet that the very measure presupposes a new negotiation on what are their differences. . . .

The objection that the board is incompetent to decide whether these cases, or any of them, are within the description submitted, arrests and stops all proceedings and in fact renders the article null and illusive. . . .

To say that the board has authority to decide that a cause is not within its jurisdiction, and yet no authority to decide that a case is within its jurisdiction,

appears to be a contradiction too glaring to be persisted in. That the commissioners have a right to decide in favor of one party only — in favor of the party complained against, but not in favor of the complainant — cannot be true.

Mr. Pinkney, the remaining American commissioner, entertained a similar view, and in part expressed it as follows :

I think that we are, *of ourselves* and without consulting the high contracting parties, the proper judges (at least in the first instance) of the nature and extent of our powers under the seventh article of the treaty — or in other words, that it belongs to us and is our indispensable duty, in the first instance, to decide in every case referred to us, without reference to the contracting parties, whether the claim is such a one as the treaty submits to our award. . . . Without such a power it is extremely obvious that the authority expressly communicated by the treaty to decide the merits of a claim and the amount of compensation to be awarded is completely nominal and illusory.

. . . If a reference to arbitrators takes place between individuals, the arbitrators are always in the first instance the judges of the scope of the submission without any specific provision to that effect in the instrument of reference.

The question arising above was referred to Lord Chancellor Loughborough, who said (Moore, 327) that "the doubt respecting the authority of the commissioners to settle their own jurisdiction, was absurd ; and they must necessarily decide upon cases being within, or without, their competency."

The view so expressed was adopted by Lord Grenville, then Minister of Foreign Affairs (2 American State Papers, Foreign Relations, 398).

The question we are now considering arose before the Philadelphia Commission, under article 6 of the Jay Treaty, and in this instance the British commissioners took the view accepted by Messrs. Gore and Pinkney, and the American commissioners the reverse view. The result was that the commission failed and the matters referred to it were subsequently disposed of by arrangement between the two countries.

The question arose and was distinctly passed upon with reference to a certain part of the claims of the Venezuelan Steam Transportation Company, although the reasoning of the court is not given. On page 26 of Morse's Report as agent and counsel for the United States, we read that, an objection being raised by the agent on the part of Venezuela to the jurisdiction of the commission over certain parts of the claim, the court "do hereby unanimously declare ourselves competent on the said portions of the claim."

Mr. Webster, speaking of the Mexican Mixed Commission (Moore, 1242), said that it "has always been considered by this government

essentially a judicial tribunal, with independent attributes and powers in regard to its peculiar functions. Its right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction, as well as to consider and decide upon the merits of the claims which might be laid before it."

A similar view was taken by Secretary Evarts with relation to the Spanish-American Commission of 1871 (Moore, 2599), he maintaining that it was an "independent judicial tribunal possessed of all the powers and endowed with all the properties which distinguish a court of high international jurisdiction, alike competent, in the jurisdiction conferred upon it, to bring under judgment the decisions of local courts of both nations, and beyond the competence of either government to interfere with, direct, or obstruct its deliberations." In this view he held that the United States were bound "to accept the rules made in the several cases submitted to the said arbitration as final and conclusive."

29. In the Pious Fund case, the first case before the Hague Permanent Court of Arbitration, it became necessary for the tribunal to consider the power of the Mexican-American Commission of 1868 to determine its own jurisdiction, and this tribunal, although not discussing the subject, referred to it in its opinion as included in the considerations leading to its conclusion, saying (Agent's Report, 17 and 876):

Considering that the convention of July 4, 1868, concluded between the two states in litigation, had accorded to the mixed commission named by these states, as well as to the umpire to be eventually designated, the right to pass upon their own jurisdiction, etc.

The opinions of the text writers upon the same subject are largely indicated in the agent's brief, in the same case (Agent's Report, 215).

That any other conclusion than the one we have indicated would be erroneous we may believe when we reflect that it is impossible for a mixed commission ever to grant or refuse an award without incidentally or inferentially passing upon its right to reach the conclusion attained, and to deny jurisdiction so to do is in point of fact to deny the right to act at all. Nevertheless, as we have seen and shall many times see, the jurisdictional question has repeatedly arisen. Even when the parties have failed to raise it; umpires have themselves done so, as in the Kinney case (Moore, 1627) before the Peruvian Claims Commission, when the umpire considered he would commit a grave abuse of authority if, perceiving he had no jurisdiction, he should proceed to pass sentence, and in the Colombian Commission (Moore,

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3614), when the umpire thought the commission should decline jurisdiction unless it clearly existed, its powers being exceptional and circumscribed.

### JURISDICTION CONFERRED BY EXCHANGE OF NOTES

30. Jurisdiction has been recognized in a commission by instruments less formal than a protocol. For instance, the protocol between Venezuela and Mexico (Ven. Arb. of 1903, 875) referred to arbitration certain "claims owned by citizens of the United States of Mexico against the Republic of Venezuela." It appearing that there were possible counterclaims affecting Mexican claims to be so presented, the Mexican and Venezuelan governments exchanged notes allowing the arbitral commission to examine and decide them (Del Rio case, Ven. Arb. of 1903, 883). So in the case of Oberlander & Messenger (Foreign Relations of 1907, 380, 381), by an exchange of notes agreed upon as sufficient, rather than a formal protocol, the time for the submission to the arbitrator was extended. A like course has been followed in many other instances, protocols not preventing.

### EFFECT OF DECISIONS OF ARBITRAL TRIBUNALS AS

#### *RES JUDICATA*

31. The inviolability, save under extraordinary circumstances, of the judgments of arbitral tribunals, is referred to in the opinion of Sir Frederick Bruce in the Panama Riot Claims case (Moore, 1408), wherein he says: "In civil courts an appeal lies to a superior tribunal; in international courts, which recognize no superior judge, fresh negotiations are opened, and a fresh commission appointed, to which the disputed cases are referred."

In the opinion of Bainbridge, commissioner, in the Woodruff case (Ven. Arb. of 1903, 153; Morris's Report, 313), it is said:

The learned counsel for Venezuela insists in his answer that this claim is *res adjudicata*. But this position can hardly be sustained in view of the fact that the first commission expressly declared the claim was in no wise to be affected or invalidated by its action in dismissing the case; and that an examination of the grounds on which the second commission based its dismissal shows that it was because the commissioners were of the opinion that "the cause of action has been misconceived and proof therefor not supplied that otherwise might have been forthcoming."

Paúl, Venezuelan commissioner, in the same case (Ven. Arb. of 1903, 158; Morris's Report, 317), apparently considered that the

claim had already been settled by arbitration, but the umpire decided the case upon another question.

32. In the Fabiani case, French-Venezuelan Commission under the protocol of 1902 (Ralston's Report, 81, 141), the umpire, referring to the case of de Cala before the Mexican Claims Commission of 1839 (Moore, 1274), quoted with approval the language of the commissioners under the Mexican-American Treaty of 1849, to the following effect :

This board has no means of knowing upon what grounds the decision of the umpire was made, nor has it any power of correcting his errors, mistakes, or omissions, even if there was clear evidence of the existence of such errors or omissions. The whole claim of de Cala was submitted to the umpire, and in his decision he recapitulated minutely the several items allowed by the American commissioners, and immediately states the amount for which, in his opinion, Mexico shall be held responsible. . . . The board is of opinion that the decision of the umpire was final and conclusive, and that, by the terms of the convention of 1839, Mexico was released from any further claim or liability growing out of the transactions upon which it was founded.

Pursuing the same subject, umpire Plumley said, 143 :

There seems to be no special agreement or covenant concerning the finality and conclusiveness of the awards, and they seem to stand upon the common basis ascribed to awards in general. Mr. Justice Story of the Supreme Court delivered its opinion. Among other things decided by the court, there appears this: "The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is *conclusive and final*. If they pronounce the claim valid or invalid, if they ascertain the amount, *their award in the premises is not reëxaminable*. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. *A rejected claim cannot be brought again under review*, in any judicial tribunal; an amount once fixed, is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty." (Comegys et al. *vs.* Vasse, 26 U. S. 193.)

33. This subject received careful consideration in the Pious Fund case by a tribunal of the Hague Permanent Court of Arbitration. It had been contended by Mexico that the prior award given by Sir Edward Thornton of the Mexican-American Claims Commission under the treaty of 1868 (Moore, 1348) was not *res judicata*; it being urged that it could only be invoked as *res judicata* as to the particular sum awarded, and not as to the data producing the result. The contention, on the other hand, of the American agent (Agent's Report, 233) was that "the common law and the civil law agree that the thing which is implied from the actual point of the decision, or which constitutes its

necessary foundation (*base essentielle*), is as much a part of the *dispositif*, or decisory part of the decision, as if it had been fully expressed and had entered into its operative words."

The Hague court in its decision in favor of the United States said (American Agent's Report, 17):

Considering that all the parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each other, and that they all serve to render precise the meaning and the bearing of the *dispositif* (decisory part of the judgment) and to determine the points upon which there is *res judicata*, and which thereafter cannot be put in question;

Considering that this rule applies not only to the judgments of tribunals created by the state, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the *compromis*;

Considering that this same principle should for a still stronger reason be applied to international arbitration, etc.

The American agent (Agent's Report, 222-228) in his brief reviewed at length the language of the most important international law writers as to the grounds upon which arbitral decisions might be attacked, concluding as follows:

The point being considered by him, no author believes that the award of arbitrators may be attacked because of erroneous appreciation either of the facts or of the law as applicable to them. We have seen that upon this point Bluntschli argues that a decision may not be attacked on the pretext that it is erroneous or contrary to equity save for errors of calculation; while Heffter finds that errors which may be alleged against the sentence, when they are not the result of a partial spirit, do not constitute a cause of nullity. Kamarowsky quotes Chrabro-Vassilewsky as contending that the effect of an arbitral sentence cannot be lost on account of reasons affecting its substance. Vattel declares that the parties may not say "it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred as such to the decision of the arbitrators." Calvo is of the opinion that the decision of arbitrators cannot be attacked on the pretext that it is erroneous or contrary to equity or prejudicial to the interests of one of the parties.

34. Notwithstanding the foregoing, not everything within the limits of an arbitral decision is *res judicata*; for it was held in the Pious Fund case (Agent's Report, 17) "so far as the money is concerned in which the actual payment should be made, that the silver dollar having legal currency in Mexico, payment in gold cannot be exacted, except by virtue of an express stipulation; that in the present instance such stipulation not existing, the party defendant has the right to free itself by paying in silver; that with relation to this point the sentence of Sir Edward Thornton has not the force of *res judicata*, except for the twenty-one annuities with regard to which the umpire decided that the

payment should take place in Mexican gold dollars, because question of the mode of payment does not relate to the basis of the right in litigation, but only to the execution of the sentence." The arbitral decision in the Pious Fund case, therefore, awarded a sum "payable in money having legal currency in Mexico." (Agent's Report, 17-18.)

#### AS TO WHAT NATIONS NOT *RES JUDICATA*

35. Of course an international award may not be maintained as *res judicata* against a nation not a party to it, and it was so declared in the arbitral sentence of Victor Emmanuel upon the question of the frontier between British Guiana and Brazil (Revue Générale de Droit International Public, 1904, document p. 18), he holding expressly that "the arbitral sentence of October 3, 1899, pronounced by the arbitral tribunal which decided the differences between Great Britain and Venezuela, attributing to the first of these powers the territory actually in dispute, cannot be invoked as a title against Brazil, which was a stranger to the litigation."

Article 84 of the Hague peace convention of 1907 expressly provides that "the award is not binding except on the parties in dispute."

#### CANNOT REVISE DECISIONS OF PRIOR COMMISSIONS

36. The Mexican Claims Commission of 1849 held (Moore, 1278) as follows :

It is not competent for us to revise the proceedings or opinions of the umpire, nor to reopen cases by him decided. Under circumstances like these disclosed here we cannot doubt that a court of chancery would set aside awards or other legal proceedings between parties and order a new trial of the whole case, but we have no such power. The application for redress is made to us upon the ground of a new and independent wrong, distinct from the original grounds of claim preferred to the former board, and the extent of damages claimed is the diminution of the award made by the umpire in consequence of the false testimony interposed by Mexico to defeat his just demand.

On this ground, the commissioners gave Leggett, claimant, an award.

#### JURISDICTION IN CONTRACT CASES

37. In a number of cases coming before Sir Edward Thornton he expressed his objections to taking jurisdiction where the question before him was one arising entirely out of contractual relations between the claimant and the Mexican government, not apparently regarding

such cases as of themselves amounting to the "injuries" referred to the commission by the terms of the protocol. For instance, in the Pond case (Moore, 3467) he said :

The umpire has already expressed his opinion that claims arising out of contracts come under the cognizance of the commission, but as these contracts are made voluntarily between the two parties, the umpire thinks that the validity of the contract should be proved by the clearest evidence, and that it should also be shown that gross injustice has been done by the defendant.

In the later Treadwell case (Moore, 3469) he said :

The umpire . . . will go further and will repeat what he has already said in a previous decision in the case of Charles Pond *vs.* Mexico, No. 190, that even if so many defects were not obvious, the commission ought not to take cognizance of claims which have arisen out of contracts between citizens of the United States and the Mexican government, entered into voluntarily by the former, unless the validity of the contracts should be proved by the claimant's evidence, and it should also be shown that gross injustice had been done by the Mexican government. In the above case the contracts, if they can be so called, were entered into by claimants voluntarily, and the later ones even rashly. In 1860 and 1861 and still more in 1864, they must have well known, as every one knew, that the Mexican government was in the greatest financial difficulties, and that there was but little chance of their being paid promptly, although the umpire cannot doubt that, if well founded, the claims will be finally paid by the Mexican government, to which the claimants state in their memorial that they had never been formally presented. The umpire accordingly awards that the above-mentioned claims be dismissed.

In the De Witt case, however (Moore, 3466), Sir Edward Thornton expressed himself as follows :

All claims, etc., arising from injuries to their persons or property by authorities, etc., comprise claims arising out of violation of contracts. . . . That the commission has, by the wording of the convention, jurisdiction over claims arising out of contracts the umpire cannot doubt, and the commissioners, in his opinion, have the right to exercise the same discretion as would be used by their respective governments.

In the State Bank of Hartford case (Moore, 3473) he again said that he did not feel justified in departing from his opinion or abandoning his conviction that where a contract was voluntarily entered into with the Mexican government, its nonfulfillment was not one of those injuries by Mexican authorities contemplated by the convention of July 4, 1868.

In the Kearney case (Moore, 3468) the same umpire said :

He [the claimant] entered into the contract of his own accord, fully aware of the condition of the Republic of Mexico and of its ability or otherwise to pay its



debts, and trusted to the good faith of the Mexican government. If the circumstances of the country afterward became such that it found a difficulty in paying its debts, or even if there were bad faith on the part of the government, the claimant cannot expect the support of his own government to remedy the consequences of his imprudence.

In the foregoing opinions Sir Edward Thornton had followed the precedent set by his predecessor, Lieber, who in the case of *Lespes* (Moore, 3466) had said :

However well founded this claim may be, the United States have, in my opinion, nothing to do with it. It is exclusively a matter between the claimant and the Mexican government, apparently ready to receive her and consider her claim. It is a matter of debt, the creditor being a woman who has no claim whatever to make the United States government her collector of debts. The tug was used by agreement at so much a day, and if the government of Mexico has not paid, I cannot see that the case would fall within the pale of our treaty, and I find it impossible to award any sum to be paid by the Republic of Mexico to the United States for the benefit of the claimant.

38. Notwithstanding the citations above given, under protocols varying but slightly in their terms from that of the Mexican Commission, commissions and umpires have found little difficulty in the way of awarding sentences against governments for nonperformance of their contract obligations, even, as we shall see, in the case of the non-payment of bonds.

Many cases of contract between foreigners and the government of Venezuela were received by the Venezuelan commissions of 1903 and acted upon without any objection being raised to their nature, and without any hesitancy on the part of the commissions, and this where such contracts were voluntarily entered into, and, even as we shall see, where they were merely implied. (*Boulton, Bliss & Dallas case*, Ven. Arb. of 1903, 26 ; *Morris's Report*, 105.) The operative word in all protocols in these cases was "claims," although in some of the protocols express reference was made to claims for "injury to or wrongful seizure of property."

#### RIGHT OF REVIEW OVER FINDINGS OF NATIONAL COURTS IN PRIZE CASES

39. The first case in which the question arose as to the right of an international tribunal to review, or rather to disregard and reach its own determination as to matters presented to prize courts, was that of the *Betsey* before the commission formed under the seventh article of the Jay Treaty (Moore, 3160, et seq.). This vessel having



and that it is no further material to our inquiries, in the execution of the trust confided to us, than as it goes to prove that compensation was unattainable by the claimants in the ordinary course of justice." He quoted with approval from Rutherforth (Vol. II, 598) to the effect that "this right of the state (to determine whether a vessel be good prize) to which the captors belong exclusively is not a complete jurisdiction. The captors, who are its members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons; but the other parties in the controversy, as they are members of another state, are only bound to submit to its sentence so far as this sentence is agreeable to the law of nations or to particular treaties, because it has no jurisdiction over them in respect either of their persons or of the things that are the subjects of the controversy. If justice, therefore, is not done them, they may apply to their own state for a remedy, which may consistently with the law of nations give them a remedy either by solemn war or by reprisals." Mr. Pinkney added that "the only ground upon which admiralty jurisdiction ever has been or ever can be rested shows that a sentence under it is not to be conclusively taken to be legal. A belligerent has this jurisdiction for its own safety *because it is answerable to other nations for the conduct of its captors.*" An award was made by the umpire in favor of the claimants.

40. We refer now to the case of the barque *Jones*, decided by the British-American Commission of 1853 (Report, 83; Moore, 3046), involving in a sense the same question now under discussion. The American commissioner assumed without any hesitation that the commission had jurisdiction to review the action of the highest British court. The British commissioner said it was never "intended that the commissioners should sit as a court of appeal from the properly constituted courts of either country," but accepted jurisdiction, new facts being adduced before the commission. The umpire found no difficulty in sustaining jurisdiction and giving an award against Great Britain.

41. The question we are now discussing was repeatedly raised before the British-American Claims Commission under the treaty of 1871, and the following statement is made in Hale's Report (88; Moore, 3210):

The question was early raised, on the part of the United States, as to the jurisdiction of these prize cases by the commission, both in respect to cases where the decision of the ultimate appellate tribunal of the United States had been had, and to those in which no appeal had been prosecuted on the part of the claimants to

such ultimate tribunal. As to the former class of cases, the undersigned may properly state that he personally entertained no doubt of the jurisdiction of the commission, as an international tribunal, to review the decisions of the prize courts of the United States, where the parties alleging themselves aggrieved had prosecuted their claims by appeal to the court of last resort. As this jurisdiction, however, had been sometimes questioned, he deemed it desirable that a formal adjudication by the commission should be had upon this question. The commission unanimously sustained their jurisdiction in this class of cases, and, as will be seen, all the members of the commission at some time joined in awards against the United States in such cases.

42. Before this commission the question as to necessity of appeal to the highest prize court before presentation of the claim to it, came up for consideration, and we find by Hale's Report (90; Moore, 3157) that in the case of *Carmalt* the claimant sought to excuse himself for nonappeal upon the ground that he had been in the state of South Carolina, then at war with the United States, and was unable to communicate with counsel in Philadelphia, where the vessel was libeled, or to make any efforts for prosecuting such appeal on account of the war then raging. The commission (Mr. Commissioner Frazer dissenting) held these reasons sufficient, but subsequently, on the hearing on the merits, unanimously disallowed the plaintiff's claim, as it appeared that he was at the time of the alleged capture domiciled within the Confederate States, and that his property was therefore liable to capture on the high seas as enemy's property.

In the case of the brig *Ariel*, Carson, claimant (Hale's Report, 90; Moore, 3157), and of the brig *Minnie*, Fisher, claimant (Hale's Report, 92; Moore, 3158); ignorance on claimants' part of the right to any appeal from the decisions of the prize court that condemned the vessels and cargoes was held to constitute no excuse for failure to prosecute the appeals, and the claims were disallowed.

In the case of the *Argonaut* (Hale's Report, 91; Moore, 3157), wrongful advice of counsel as to the lack of necessity for taking such appeal was held insufficient to excuse its want.

In the cases of the brig *Sarah Starr* and the schooner *Aigburth* (Hale's Report, 91; Moore, 3158), poverty of the claimant and advice that he would not be likely to obtain impartial justice from the Supreme Court were held insufficient reasons for the lack of an appeal. So in the case of the schooner *Prince Leopold* (Hale's Report, 91; Moore, 3158), poverty and inability to pay counsel, and expectation that his proctor would prosecute the suit at his own expense, of the failure of which expectation he was not advised in due season, were held insufficient.

In the case of *M. S. Perry*, otherwise known as the *Salvor* (Hale's Report, 92 ; Moore, 3158), the claimant, who resided in Havana, had no opportunity to interpose any claim or defense; acting on the advice of Lord Lyons, British minister, that he would have full opportunity to defend his case, — advice later proved erroneous by the fact that his attempts to secure defense were futile, — and failed to appeal. These facts, together with expeditious action on the part of the prize court, were held sufficient to excuse the want of the appeal.

In the case of the *Will o' the Wisp* (Hale's Report, 92 ; Moore, 3158), lack of knowledge of the appealability of the case, and supposition that the appeal should be made to the claimant's government, were held to constitute no excuse.

So in the case of the schooner *Adelso* (Hale's Report, 92 ; Moore, 3158), poverty and apprehension of the danger of investing more money in law expenses were held to be insufficient excuse.

Another case before the same commission, in which jurisdiction was apparently refused in part because of abandonment of the right of appeal, was that of the *Jane Campbell* (Hale's Report, 148).

43. In some of the cases enumerated, as well as in others now referred to, the commission reached the same result as the Supreme Court of the United States, as for instance :

*Isabella Thompson*, 3 Wallace, 155 ; Moore, 3159 ; Hale's Report, 93.  
*The Peterhoff*, 5 Wallace, 28 ; Moore, 3838 ; Hale's Report, 136.  
*The Dashing Wave*, 5 Wallace, 170 ; Moore, 3948 ; Hale's Report, 110.  
*The Pearl*, 5 Wallace, 574 ; Moore, 3159 ; Hale's Report, 115.  
*The Adela*, 6 Wallace, 266 ; Moore, 3159 ; Hale's Report, 128.  
*The Georgia*, 7 Wallace, 32 ; 4 Moore, 3957 ; Hale's Report, 139.

In others a different conclusion was reached, as in

*The Hiawatha*, 2 Black, 635 ; Moore, 3902 ; Hale's Report, 130.  
*The Circassian*, 2 Wallace, 135 ; Moore, 3911 ; Hale's Report, 141.  
*The Springbok*, 5 Wallace, 1 ; Moore, 3928 ; Hale's Report, 117.  
*The Science*, 5 Wallace, 178 ; Moore, 3950 ; Hale's Report, 112.  
*The Volant*, 5 Wallace, 179 ; Moore, 3950 ; Hale's Report, 111.  
*The Sir William Peel*, 5 Wallace, 517 ; Moore, 3935 ; Hale's Report, 100.

The United States faithfully abided by the decisions of the commission adverse to those of its own courts.

44. In the Corwin case (United States and Venezuelan Claims Commission of 1889, Report, 119, 125 ; Moore, 3210) the doctrine laid down by the American commissioners under the Jay Treaty was discussed. The commissioners said :

The Supreme Court of the United States declared a prize tribunal " a court of the law of nations and takes neither its character nor its rules from the municipal

law." Schooner *Adeline*, 9 Cranch, 244. . . . We do not understand the doctrine announced by the commissioners under the treaty of 1794, between the United States and Great Britain, to be at variance with the foregoing. While they refused acquiescence to the contention that a prize sentence affirmed by the Lords Commissioners was conclusive on the parties (except as to the *rem*) they seemed to place it (otherwise) along with other judgments. They said: "A sovereign is as much liable for wrongful action of prize courts as he is for the wrongful action of any other court." Their insistence may be condensed in almost their exact words: "Prize jurisdiction must be *rightfully* used by the state that claims it." From this no one will dissent. Counsel for Venezuela, then, is quite right in saying, "The question for us is not whether upon the facts before the prize court we would have come to a different conclusion." It is whether the proceedings and judgment of that court were *manifestly* and *certainly* wrong, to the prejudice of the claimant. We are not convinced of their wrongfulness.

#### CALVO CLAUSE

45. A vexed question before international tribunals of late has been the force and efficacy to be given to the so-called Calvo Clause, illustrated in part by the eleventh article of the Fitzgerald Concession (Ven. Arb. of 1903, 202; Morris's Report, 460), reading as follows: "Any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the republic and by the competent tribunals of the republic."

A more complete illustration is found in a like clause of the Grill Concession, afterwards assigned to the Orinoco Shipping and Trading Company (Ven. Arb. of 1903, 100): "Disputes and controversies which may arise with regard to the interpretation or execution of this contract shall be resolved by the tribunals of the republic in accordance with the laws of the nation, and shall not in any case be considered as a motive for international reclamation."

Two common questions arise: Do these clauses in themselves establish as beyond controversy the right of the local courts to finally and conclusively pass upon all questions which may arise under the contract? And is an appeal to an international tribunal under such circumstances permissible?

46. Perhaps the earliest case in which the subject received discussion was that of Day, Venezuelan and American Claims Commission of 1889 (Report, 247; Moore, 3548). In this a clause contained a provision directing that: "Any doubts, difficulties, or misunderstandings that may arise from, or have any connection with, or in any manner relate to this contract, directly or indirectly," should be submitted to private arbitration at Caracas, and that "therefore this contract shall never, under any pretext or reason whatever, be cause for any

international claims or demands." The contracts containing the clause were for reasons not necessary to discuss held invalid. The majority of the commission held, however, that even were this not the case, "the contracts provide a mode of settlement by arbitration for any differences or difficulties that may arise as to their legal validity, which is inconsistent with any attempt to make them cause for an international claim on any pretext whatever." From this expression of opinion, Judge Little dissented (Report, 273; Moore, 3564), holding that as the government had declared the whole of the contracts at an end the company had a right to assume that the government "would not countenance action under any of their provisions. The government under the contracts had a voice in the selection of arbitrators. Its action closed the door, therefore, to arbitration; and the failure to resort to that means of adjustment cannot, in my judgment, be rightfully set up as a defense here in its behalf."

47. The same question came up again before this commission in the Flannagan, Bradley, Clark & Co. case, and the commission similarly divided, Findlay, American, and Andrade, Venezuelan, denying the right of the commission to adjudicate, and Little maintaining its jurisdiction. Mr. Findlay, speaking for the majority of the commission, said (United States and Venezuelan Claims Commission, Report, 425; Moore, 3564):

The concession or charter was granted on the distinct condition, as clearly expressed as language could make it, that nothing relative to it or any decision upon matters growing out of it should ever be made the subject of an international reclamation; but on the contrary, all doubts and controversies of whatever kind affecting the agreement, should be referred to the judicial tribunals of Venezuela, and be there determined in the ordinary course of the law.

The failure to pay the stock subscription, in our opinion, was a clear violation of the terms of the concession, but it is equally clear that Venezuela, either from experience or forecast, realized the importance of referring all questions which might arise in the prosecution of the enterprise to the jurisdiction of her own tribunals, and expressly excluded them from the sphere of international reclamations.

Nothing could be clearer, more comprehensive or specific than the language of the concession upon this point. Even when such questions were transferred for adjudication by her courts, such was her anxiety to avoid any possible international entanglement, that she resorted to the doubtful expedient, perhaps, of providing that the decision of her courts should not be drawn in question by foreign intervention. Whether a decision so made in palpable violation of the rights of the parties could be allowed to stand on a claim of denial of justice is a question not necessary for the decision in this case, but we should think it more than doubtful; but the insertion of such a provision shows how solicitous she was to withdraw the concession and the questions which might arise under it from every possible cognizance and jurisdiction except her own. This she certainly had a right to do, and

the concessionaries, if we may adopt that term, had an equal right to decline the concession on such terms. . . . They agreed that their whole case, whatever it might be, growing out of the concession, should be finally disposed of by the domestic tribunals of that country. . . .

We have no right to make a contract which the parties themselves did not make, and we would be surely doing so if we undertook to make that the subject of an international claim, to be adjudicated by this commission, in spite of their own voluntary undertaking that it was never to be made such, and should be determined in the municipal tribunals of the country with respect to which the controversy arose. . . .

It is to be presumed that they would not have made such a stipulation if the laws and courts of Venezuela were helpless in affording them a remedy; but whether they were or not, so they made their bed and so they must lie in it. . . .

Recurring to the concession, if it be said, as it has been said before, that Venezuela has waived her right to have questions arising under it determined by her own courts, and has submitted herself to the jurisdiction of this tribunal by the terms of the convention of 1885, we can only repeat that there is no evidence of such an intention; that no inference of this kind can be drawn from the general submission of "all claims"; that these were contractual in their nature necessarily come before us in the textual form in which the agreement has been embodied, and that when we look to that and see that jurisdiction is not only not given but expressly denied, we should be breaking the contract instead of enforcing it, if we adopted any other construction.

Judge Little, in his dissenting opinion (Report, 451; see Moore, 3566), said, among other things:

An agreement, in my judgment, between the United States and Venezuela to submit these claims to a mixed commission for decision according to justice, superseded and took the place of any previous understanding between the latter and the claimants, if any binding one existed, to submit them to any other tribunal for determination. . . . I do not believe a contract between a sovereign and a citizen of a foreign country not to make matters of difference or dispute, arising out of an agreement between them or out of anything else, the subject of an international claim, is consonant with sound public policy, or within their competence.

It would involve *pro tanto* a modification or suspension of the public law, and enable the sovereign in that instance to disregard his duty towards the citizen's own government. If a state may do so in a single instance, it may in all cases. By this means it could easily avoid a most important part of its international obligations. It would only have to provide by law that all contracts made within its jurisdiction should be subject to such inhibitory condition. For such a law, if valid, would form the part of every contract therein made as fully as if expressed in terms upon its face. Thus we should have the spectacle of a state modifying the international law relative to itself! The statement of the proposition is its own refutation. The consent of the foreign citizens concerned can, in my belief, make no difference—confer no such authority. Such language as is employed in Article 20, contemplates the potential doing of that by the sovereign towards the foreign citizen for which an international reclamation may rightfully be made under ordinary circumstances. Whenever that situation arises, that is, whenever a wrong occurs of such a character as to justify diplomatic interference, the



government of the citizen at once becomes a party concerned. Its rights and obligations in the premises cannot be affected by any precedent agreement to which it is not a party. Its obligation to protect its own citizen is inalienable. He, in my judgment, can no more contract against it than he can against municipal protection. A citizen may, no doubt, lawfully agree to settle his controversies with a foreign state in any reasonable mode or before any specified tribunal. But the agreement must not involve the exclusion of international reclamation. That question sovereigns only can deal with.

48. The case above referred to of Flannagan, Bradley, Clark & Co., again came before the United States and Venezuelan Claims Commission of 1903 as the Woodruff case (Ven. Arb. of 1903, 151; Morris's Report, 313). In this, Bainbridge, commissioner, considered that the judgments of the former commissions did not constitute *res judicata*, in view of the fact that the first only had "expressly declared the claim was in no wise to be affected or invalidated by its action in dismissing the case; and that an examination of the grounds on which the second commission based its dismissal" showed that it was because the commissioners were of the opinion that "the cause of action" had "been misconceived and proofs therefor not supplied that otherwise might have been forthcoming." Considering the claim as one clearly owned by a citizen of the United States, he believed that an award should be made.

Paúl, Venezuelan commissioner, relied upon the opinion of Mr. Findlay cited *supra*, and the question was sent to the umpire, who held that "by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction of this commission"; the claimant having known when he bought the bonds or received them in payment, or accepted them on whatsoever ground, that all questions about liability for the bonds had to be decided by the common law and ordinary tribunals of Venezuela, and by accepting them having agreed to this condition. The opinion of Barge, umpire, recognized that in the event of denial of justice or unjust delay of justice the claimant might have had a footing before him.

49. The same question arose in a somewhat different manner before the United States and Chilean Commission under the convention of 1892 (Moore, 2318), in the case of the North and South American Construction Co. against Chile. This provided for the reference of the questions or disputes as to the interpretation and execution of the contract to arbitrators to be appointed in the manner stated. Subsequently the Chilean government suppressed the tribunal of arbitration, and the majority of the commission held that by such suppression "the memorialist has recovered its entire right to invoke

or accept the mediation or protection of the government of the United States," although by another clause of the agreement it had been provided that in all matters and things relating to the contract the company was to be treated as a citizen of Chile, and that in relation to such matters and things it would neither invoke nor accept the mediation or protection of the United States.

The Chilean commissioner dissented, arguing among other things that the clause of the contract providing that the contractors should "be considered for the ends of the contract as Chilean citizens" placed them entirely under the control of Chile, and permitted Chile at its discretion to abolish the tribunal referred to precisely as if the contractor had been a citizen of Chile.

50. The same question received consideration by the Venezuelan-American Commission in the Rudloff case (Ven. Arb. of 1903, 182; Morris's Report, 431). In this instance the matter in controversy was at the time pending before the local courts, and Bainbridge, commissioner, held that nevertheless the commission had jurisdiction, Paúl denying it. The umpire sustained jurisdiction, saying that, notwithstanding the provisions that all doubts and controversies should be decided by the tribunals of the republic, "it has to be considered that this stipulation by itself does not withdraw the claims based on such a contract from the jurisdiction of this commission, because it does not deprive them of any of the essential qualities that constitute the character which gives the right to appeal to this commission; but that in such cases it has to be investigated as to every claim, whether the fact of not fulfilling this condition and of claiming another way, without first going to the tribunals of the republic, does not infect the claim with a *vitium proprium*, in consequence of which the absolute equity (which, according to the same protocol, has to be the only basis of the decisions of this commission) prohibits this commission from giving the benefit of its jurisdiction (for as such it is regarded by the claimants) to a claim based on a contract by which this benefit was renounced and thus absolving claimants from their obligations, whilst the enforcing of the obligations of the other party based on that same contract is precisely the aim of their claim." As the evidence of such a *vitium proprium* could only arise from an examination of the claim in its details, jurisdiction was maintained.

51. In the American Electric and Manufacturing Co. case (Ven. Arb. of 1903, 246; Morris's Report, 517), Barge, umpire, held that, notwithstanding a clause providing that "doubts and controversies which may arise in consequence of this contract shall be settled by

the courts of the republic in conformity with its laws," an appeal could nevertheless be had to the commission upon what he considered as collateral promises.

52. A more important case before the same umpire was that of the Orinoco Steamship Co. against Venezuela (Ven. Arb. of 1903, 72; Morris's Report, 266). In this instance the original contract upon which claimant based its right read :

Disputes and controversies which may arise with regard to the interpretation or execution of this contract shall be resolved by the tribunals of the republic in accordance with the laws of the nation, and shall not in any case be considered as a motive for international reclamations.

The umpire held that, considering that under the ordinary rules for invoking diplomatic intervention the claimant must have exhausted the legal remedies at its disposal before the ordinary tribunals of the country, the occasion for invoking this rule was much stronger "where the recourse to the tribunals of the country was formally pledged and the right to ask for intervention solemnly renounced by contract, and where this breach of promise was formally pointed to by the government whose intervention was asked." He concluded that the article of the contract above referred to disabled "the contracting parties to base a claim on this contract before any other tribunal than that which they have freely and deliberately chosen."

53. In the *Turnbull et al.* case (Ven. Arb. of 1903, 200; Morris's Report, 500) the clause under discussion read :

Any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the republic and by the competent tribunals of the republic.

Umpire Barge held :

If one of the parties claims for damages sustained for reason of breach of contract on the part of the other party, these damages can, according to the contract itself, only be declared due in case the expressly designed [designated?] judges had decided that the fact, which according to the demanding party constituted such a breach of contract, really constituted such a breach, and therefore formed a good basis whereon to build a claim for damages. Parties have deliberately contracted themselves out of any interpretation of the contract and out of any judgment about the ground for damages for reason of the contract, except by the judges designed [designated?] by the contract; and where there is no decision of these judges that the alleged reasons for a claim for damages really exist as such, parties, according to the contract itself, have no right to these damages, and a claim for damages which parties have no right to claim cannot be accepted.

54. In the case of the *Coro and La Vela Railway and Improvement Co.* before the same commission (Morris's Report, 69, 70), the concession reading as follows, —

Any doubt or controversy that may arise in the interpretation or execution of this contract will be decided by the ordinary tribunals of the republic, and in no case or for any motive will any international claims be admitted on account of this concession, —

jurisdiction was exercised, and the commission united in granting an award in favor of the claimant.

55. In the Genovese case (Ven. Arb. of 1903, 174; Morris's Report, 397), although a similar provision existed in the contract, the commissioners united in an award in favor of the claimant, Paúl, Venezuelan commissioner, speaking for himself and his associate, although on the same day Barge, umpire, made an award in another case, as we have seen, denying jurisdiction.

56. In the case of La Guaira Electric Light and Power Co. (Ven. Arb. of 1903, 178; Morris's Report, 406), Bainbridge, commissioner, speaking for the commission, said that as to a part of the claim it was not one "in which the government itself had violated a contract to which it was a party. In such a case, the jurisdiction of the commission under the terms of the protocol is beyond question."

57. The general subject received attention in the Selwyn case (Ven. Arb. of 1903, 322), wherein the language of the contract was:

Any doubts and controversies that may arise regarding the spirit or execution of this present contract will be settled by the tribunals of the republic and according to their laws without there being in any case a matter for an international claim.

Plumley, umpire, in discussing this, said that a private arbitration to the extent of the submission supersedes action by the court, and added:

It is the judgment of the umpire that the rule above stated is the same, so far as it touches the question before this commission, where the arbitration is between nations and the submission concerns private claims.

International arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto, and if judgment has been pronounced by such court, to disregard the same so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof as in the given case justice may require. Within the limits prescribed by the convention constituting it, the parties have created a tribunal superior to the local courts.

58. The last case in which a like clause was considered by any of the Venezuelan commissions of 1903 was that of Martini (Ven. Arb. of 1903, 819). Here the clause read:

The doubts or controversies which may arise in the interpretation and execution of the present contract will be resolved by the tribunals of the republic in conformity with its laws, and in no case will be the ground for international reclamation.

The umpire held that even if the dispute presented to him could be considered as embraced within the terms "the doubts or controversies which may arise in the interpretation and execution of the present contract," relating as it did to damages inflicted upon the claimants for which it was sought to hold the government of Venezuela liable, the objection could be disposed of by a single consideration as follows :

Italy and Venezuela, by their respective governments, have agreed to submit to the determination of this mixed commission the claims of Italian citizens against Venezuela. The right of a sovereign power to enter into an agreement of this kind is entirely superior to that of the subject to contract it away. It was, in the judgment of the umpire, entirely beyond the power of an Italian subject to extinguish the superior right of his nation, and it is not to be presumed that Venezuela understood that he had done so. But aside from this, Venezuela and Italy have agreed that there shall be substituted for national forums, which, with or without contract between the parties, may have had jurisdiction over the subject matter, an international forum, to whose determination they fully agree to bow. To say now that this claim must be rejected for lack of jurisdiction in the mixed commission would be equivalent to claiming that not all Italian claims were referred to it, but only such Italian claims as have not been contracted about previously, and in this manner and to this extent only the protocol could be maintained. The umpire cannot accept an interpretation that by indirection would change the plain language of the protocol under which he acts and cause him to reject claims legally well founded.

59. In the case of the Nitrate Railway Co., Limited, against Chile (Reclamaciones Presentadas al Tribunal Anglo-Chileno, Vol. II, 320 et seq.), the question being raised by Chile as to the right of the claimant to recover, it appeared that the government of Peru, for which the government of Chile had been substituted by its annexation of the territory of Tarapaca, had granted a railroad concession to presumably Peruvian citizens ; that by its terms the cessionaries had the power to transfer their rights to third persons with the approval of the government, stipulating, however, that " if the transfer is made in favor of foreigners, they should remain subject to the laws of the country, without power to exercise diplomatic intervention [*recurso*]," and the claimant was substituted in place of the first cessionary. A majority of the commission, consisting of the umpire and the Chilean arbitrator, said :

Considering that private individuals or associations can, for the purpose of obtaining from a foreign government, privileges and concessions of public works, of mines or of exploitation of ways of communication, and to accommodate thus their own interests, renounce the protection of their governments, and agree by contract not to resort to diplomatic action in the case of difficulties arising between themselves and the ceding government ; that as every government possesses the right

not to give such concessions, except to its nationals, it can, if it consents to grant such concessions to foreigners, require them to place themselves upon a footing of equality with nationals, and that they should promise not only to submit themselves to the laws of the country, but also not to invoke the intervention of the governments to which they belong in the solution of the questions which may arise from contracts freely entered into; that no principle of international law forbids citizens to agree personally to such contracts, which furthermore do not obligate foreign governments;

Considering that this arbitral tribunal, while being a tribunal of justice, which decrees in conformity with the principles of international law and the jurisprudence of analogous tribunals of superior authority and prestige, derives its origin from a diplomatic agreement entered into between the government of Chile and that of Great Britain, September 26, 1903; that the convention celebrated on that day had for its sole end to substitute diplomatic action by the jurisdiction of the arbitral tribunal; that the preamble of the said convention said so expressly in the following terms: "Both governments to put a friendly end to the claims brought forward by the British Legation in Chile, because of the civil war" have agreed to celebrate a convention of arbitration; that Article 1 stipulates that the claims should be countenanced by the Legation of His Britannic Majesty and that it results from the nature itself of arbitration, as well as from the text and spirit of the convention, that this tribunal replaces, in order to determine a given category of business, the diplomatic action existing on their account between both governments, and that consequently the individuals or societies which have bound themselves by contract freely celebrated not to have recourse personally to diplomatic action, likewise cannot invoke, directly or personally, the intervention of the British Legation, nor seek the jurisdiction of this tribunal, for the resolution of questions which may arise between them and the government with which they have contracted, and toward which they have made express agreements, etc.

Mr. Alfred St. John, the English arbitrator, dissented from the foregoing opinion, saying, among other things (page 326), that "the undersigned cannot accept these positions," and maintaining that the tribunal was perfectly competent to take cognizance of this claim, inasmuch as the clauses of reference did not contain elements which are attributable to them. Furthermore, the presentation to the tribunal was not a resort to diplomacy.

In the later case of the Antogafasta and Bolivia Railway Company (Vol. III, 788, et seq.), the majority of the commission at this time, including the umpire of the British Commission, the Chilean arbitrator dissenting, recognized the limitation on the above rule, the majority holding, following the reasoning enunciated in the sentence in the case of Robert Stirling (Vol. I, 159), that the tribunal was "competent to take cognizance of claims presented by an English corporation duly organized to transact business in Chile, and that there was no new element in the present case which would cause a denial of this right to the claimant society," and in effect that although the original contract of concession provided that

"the company and the persons, the questions to whom rights to railway may be transferred, will remain in all events subject exclusively to the authorities and laws of the republic," this provision not being at all contrary to the invocation by the company of English nationality of the jurisdiction of the tribunal which accorded to British persons a special jurisdiction for the certain matters determined upon by the convention. The Chilean arbitrator, in dissenting, thought that, referring to the provisions of the concession we have above quoted, "it would be difficult to express in more energetic and categorical terms, a more explicit renunciation on the part of the concessionaries to all diplomatic protection."

60. The last case in which any umpire has been called upon to consider the clause we are now discussing was that of the French Company of Venezuelan Railways, French-Venezuelan Claims Commission of 1902 (Ralston's Report, 367). In this, Plumley, umpire, said (page 445):

The umpire cannot entirely ignore the restrictive features of the contract between the claimant company and the respondent government, which in terms and in fact strictly required and still requires that all doubts and controversies arising from that contract should be resolved by the competent tribunals of the respondent government. Certainly to consider and determine the question of its rescission is the most serious doubt, the most important controversy, which could grow out of or arise from the contract in question. A claim for damage may be regarded as ulterior to the contract, especially where the damage has accrued from the operation of the parties under the contract, but the question of its rescission is an entirely different proposition. The unrestricted agreement to submit to an arbitral tribunal the question of damages suffered by Frenchmen in Venezuela may properly be considered, if necessary, as equivalent to a suspension of the provision in the contract, were the damages claimed to be such as arose or grew out of the contract; but the agreement to submit a question of damages arising through operations performed under a contract, in no sense suggests a purpose to arm that tribunal with plenary powers to consider and settle the question involved in the rescission of a contract, and therefore does not suggest an intent on the part of the high contracting powers to ask on the one hand or to grant on the other the suspension of the restrictive features referred to, which are contained in said contract. What is here said concerning the matter of rescission applies with equal force to the matter of abandonment. It is therefore the deliberate and settled judgment of the umpire that he cannot determine this claim on the basis of a declared and directed rescission or of abandonment, and can only decide the amount of the award, this to depend upon the ordinary basis of damages which have been suffered in Venezuela by the French Company of Venezuelan Railroads at the hands of those for whom the respondent government is responsible.

61. It is to be noted before leaving the question that in the case of the Tehuantepec Ship Canal, etc. Co. *vs.* Mexico, before the Mexican-American Claims Commission under the treaty of 1868

(Moore, 3132), there had been a stipulation that all questions arising under the contract between the claimant and the Mexican government should be adjusted through private arbitration, by two arbitrators, one to be chosen by each of the parties interested, and that, in the event of their disagreement, the dispute should be referred to some court of justice of lawful jurisdiction in the United States of Mexico; and Wadsworth, speaking for the commission, said that, putting other questions aside, there was nothing in the record to show that the memorialist had made any effort to settle the question of difference by arbitration or by an appeal to the courts of justice. "This," he said, "must first be shown, before we can venture to decide upon the complaint, as one referred to by the convention."

62. The question which we are now discussing was raised in the case of Milligan before the Peruvian Claims Commission (Moore, 1643). The contract under which the claimant sought recovery from the Peruvian government bound the claimant's predecessors in interest to refer all matters of difference between themselves and other parties to the courts of Peru. The American commissioner, with reference to this point, contended that by declaring the contract null and void the Peruvian government had deprived itself of the benefit of the article by which the company was bound to refer all differences with other parties to the Peruvian courts. Failing to agree, the commissioners had resolved to refer the case to one of the umpires, when conciliation was resorted to, with the result that an award was made in favor of the claimant.

#### SUPERIORITY OF ARBITRAL TRIBUNALS OVER LOCAL COURTS

63. In the discussions of the Calvo Clause, and of the review of the decisions of prize courts, we have had occasion to refer to a number of decisions showing the superiority of arbitral tribunals over local courts having power to act, or having undertaken to act, with relation to the same subject matter. We do not now repeat the cases there discussed, but pass to other cases involving analogous questions.

64. In the Morrill case, Mexican Commission of 1868 (Moore, 3465), the claimant made application before a bureau having jurisdiction to adjudicate, and his credit was admitted as valid; but before receiving payment he withdrew his application and went before the commission. The commissioners made an award in his favor, saying that, as no objection was ever made to the claim, or any doubt raised as to its justice, it should be paid.



65. The Court of Cassation of France in the *Phare* case (Moore, 4871) referred to it by the consent of Nicaragua and of the French government, and therefore acting as an arbitral tribunal, held that, "whereas it was expressly agreed . . . that the court should have power not only to take into consideration all the facts on which the claim was based, but also, in case Nicaragua should be deemed responsible, to fix the indemnity which should be paid to Captain Alard; whereas, in the presence of such stipulations, it is impossible not to recognize the fact that it was the common intention of the two governments to invest the arbitral tribunal with all power and jurisdiction for the purposes of reviewing and estimating the litigated facts as a whole, and of pronouncing definitively on the difference which had arisen between them, independently of what was decided by the judicial authority of Nicaragua in respect of Captain Alard," the plea of *res judicata* founded on the judgment of one of its courts in the matter should be rejected.

66. In the case of Jonathan Braithwaite before the American and British Claims Commission under the treaty of 1871 (Hale's Report, 42; Moore, 3737) it was contended on the part of the United States that the claimant, being domiciled in Kentucky, had precisely the same remedy for property taken for public use as citizens of the United States residing within the loyal states; that the laws of the United States afforded him appropriate means of securing compensation before the proper bureau of the War Department; and that the case was not one for international reclamation. The commission, nevertheless, gave an award unanimously in favor of the claimant.

The same commission, in the Crutchett case, the fundamental facts affecting jurisdiction being similar, reached a like conclusion (Hale's Report, 46; Moore, 3734; Howard's Report, 33). It is to be noted, however, that in this case, on the part of the claimant, it was contended that the jurisdiction of the Court of Claims, which had formerly existed, had been taken away, leaving him remediless except before an international tribunal.

In a number of cases (Hale's Report, 47; Moore, 3747), there being pending suits in the Court of Claims, or on appeal or previously decided, the same commission unanimously sustained the demurrer of the United States, and they were dismissed, the commissioners apparently again distinguishing between cases pending before a governmental bureau and those pending before a court.

In the cases of Elizabeth Knowles and others (Hale's Report, 49; Howard's Report, 48; Moore, 3748), no suit at all having been

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brought in the Court of Claims, the commission took jurisdiction, Commissioner Frazer, however, dissenting.

67. The Venezuelan Constitution and laws provide for the adjudication of claims against the government for acts committed by her public authorities. Nevertheless many of the commissions sitting in Caracas in 1903 took jurisdiction without hesitation over claims which might have been submitted to the local tribunals. They refused, whenever the question arose, to recognize a provision of the Venezuelan Constitution denying compensation to foreigners for obligations or responsibilities which might not exist in favor of nationals in like cases thereunder (Sambiaggio case, Ven. Arb. of 1903, 666, 687).

#### APPEAL TO LOCAL COURTS AND DENIAL OF JUSTICE

68. In close relation to the subject of necessity of appeal to the local courts in matters of contract is that of their proper formation and what constitutes denial of justice before them, justifying appeal to arbitral tribunals for relief.

In the Cotesworth & Powell case (Moore, 2081) it was the holding of the umpire that "every nation should provide just and reasonable laws for the administration of justice; and it is equally the duty to provide means for their prompt and impartial execution. Reasonable diligence should be exercised in securing competent and honest judges. This done, the nation has no further concern than to see that they do not neglect their duties. [Citing Vattel, Book II, Secs. 77-78] . . . Every definitive sentence of a tribunal, regularly pronounced, should be esteemed just and executed as such. As a rule, when a cause in which foreigners are interested has been decided in due form, the nation of the defendants cannot hear their complaints."

69. The courts so constituted must be formed in conformity with law. As was held in the Idler case (Moore, 3491; United States and Venezuelan Claims Commission of 1889, 139), "Venezuela could, of course, constitute her courts as she desired, but having established them, it was Idler's right, if his affairs were drawn in litigation there, to have them adjudicated by the courts constituted under the forms of law. The acts of the two judges in appointing the other two *ad hoc*, were not only not under color of law, but in violation of its express provisions. A body so constituted could not have legal validity. Its acts could not bind absent parties. They would be utterly void. Had Idler appeared, and consented to the jurisdiction of the improvised tribunal, a different aspect would be presented, and perhaps a different question."

70. The duty of the courts and the manner in which they must exercise their processes was laid down by the arbitrator in the Van Bokkelen case (Moore, 1842), he saying :

It would seem clear that the guaranty to the citizens of contracting states of "free access to the tribunals of justice in all cases to which they may be a party on the same terms which are granted by the laws and usage of the country to native citizens," means that they shall be entitled to the exercise of all the processes of the courts of the respective countries, whether they concern rights or remedies. And the extent to which these processes of the courts may be invoked is expressed in language equally free from doubt: "On the same terms which are granted by the laws and usage of the country to native citizens."

71. That the obligation to resort to the courts is reciprocal whenever it exists will be manifest from authorities to which reference is now to be made.

In the El Triunfo case against Salvador (Foreign Relations of 1902, 871) it was said :

In any case, by the rule of natural justice obtaining universally throughout the world wherever a legal system exists, the obligation of parties to a contract to appeal for judicial relief is reciprocal. If the republic of Salvador, a party to the contract which involved the franchise to El Triunfo Company, had just grounds for complaint that under its organic law the grantees had, by misuser or nonuser of the franchise granted, brought upon themselves the penalty of forfeiture of their rights under it, then the course of that government should have been to have itself appealed to the courts against the company and there, by the due process of judicial proceedings, involving notice, full opportunity to be heard, consideration, and solemn judgment, have invoked and secured the remedy sought.

So in the Turnbull case (Ven. Arb. of 1903, 200; Morris's Report, 460) it was the opinion of Bainbridge, commissioner, that the government had no right of itself to undertake to decide that the claimants had by misuser or nonuser forfeited their rights to a concession, and in this opinion Barge, umpire, in the same case (page 244), coincided, stating that "the nonfulfillment of the pledged obligations by one party does not annul the contract *ipso facto*, but forms a reason for annulment, which annulment must be asked of the tribunals, and the proper tribunal alone has the power to annul such a contract — this rule of the law of almost all civilized nations being in absolute concordance with the law of equity—that nobody can be judge in his own case."

In the Lowe case before the Spanish Commission (Moore, 3270), Bartholdi, umpire, found the Spanish authorities at fault in neglecting to comply with treaty obligations by not referring immediately the examination of the case to a competent court.

72. The question involved in the *Turnbull* case also presented itself before the Franco-Chilean Arbitral Tribunal, which, in its opinion (page 297), declared that "it did not depend upon the Peruvian Congress to pronounce the nullity of an agreement coming under private law on account of the defect of capacity of one of the parties; that such questions are under the exclusive control of tribunals, since they may only be judged according to the civil laws (Carlos Weisse, *Règles de droit international*, sec. 59), and the legislative power cannot take jurisdiction over them without violating the principle of the division of powers; that it results from the declaration of the Peruvian government itself that 'the independence of the judicial power has always been considered by Peru as a principle of the constitution and of public order.'"

73. In the *Bovallins & Hedlund* case (Ven. Arb. of 1903, 952) the umpire of the Swedish-Venezuelan Commission excused the claimants for not having requested the Venezuelan government to prosecute and punish criminals before its courts, because such men were subsequently cloaked with authority in the very region where the events complained of took place, and considered that these circumstances were sufficient to show that the claimants had not been able to address themselves to a local authority for the purpose of taking testimony necessary to prove legally the damages and injuries suffered.

74. A failure to resort to local courts, even in claims directly against the government, has several times been held insufficient reason for debarring them from appearing before an international tribunal. In the *Mannasse* case (Moore, 3463), Lieber, umpire of the Mexican-American Commission under the treaty of 1868, said:

It is asked why did not Mannasse & Co. profit by the proclamation of President Juarez of November 19, 1867, in which he calls all inhabitants of Mexico to present "all claims for credits contracted to sustain the war against foreign intervention" and to have them adjusted according to certain rules prescribed by him. The answer is that Mannasse & Co. did not do so, and that their not doing so does not necessarily deprive them of the right to appear before an international commission and have their claim adjudicated.

As we have seen in the cases of Knowles and others (Hale's Report, 49; Howard's Report, 48; Moore, 3748), in which no suit had been brought in the Court of Claims, the majority of the British-American Claims Commission took jurisdiction.

75. In the case of the French Company of Venezuelan Railroads, French-Venezuelan Claims Commission under the treaty of 1902

(Ralston's Report, 367, 445), the umpire, while taking jurisdiction to pass upon questions of damages, still believed that he could not entirely ignore the provisions of the contract which required that all doubts and controversies arising therefrom should be resolved by the competent tribunals of the respondent government, and considered that to determine the question of its rescission was "the most serious doubt, the most important controversy, which could grow out of or arise from the contract in question," and that the same should be passed upon by the Venezuelan courts.

76. The fact that local courts may have jurisdiction over the matter will not justify removal of the controversy to a distant point, and it was so held by Upham, commissioner, in the case of the brig *Jones*, before the British-American Commission of 1853 (Report, 83, 92); the umpire agreeing with him as to his conclusion, but expressing himself only as to the measure of damages. Mr. Upham remarked that "where a vessel is seized in harbor and is subject there in all respects to the jurisdiction of competent authorities for the punishment of the offense charged against her, the removal of such vessel to a remote and distant jurisdiction for trial, even though it may be done under the form of law, is an unjust and oppressive act in violation of the spirit of British institutions."

77. That the local courts possess control over the tenure of real estate we shall see elsewhere, and in confirmation we now only refer to the Anderson case, decided by Sir Edward Thornton, as umpire (Moore, 2317). It would only be in a case of denial of justice that their rulings as to such a matter could be reviewed internationally.

78. We herein point out, when discussing the liability of governments, that they are not in many cases to be held responsible for the acts of their officials or private individuals unless there has been a denial of justice, and that there could not be such denial unless all possible right of appeal had been exhausted.

An extended definition and discussion of the term "denial of justice" occurs in the Fabiani case (Moore, 4895), the arbitrator saying:

A direct definition of denial of justice is not given by article 5 of the French-Venezuelan convention. The text only indicates it among the causes of diplomatic intervention, and one could even believe that it distinguishes it in some manner from other causes of intervention — delays, want of execution of a definitive decree, etc. — or that it separates itself from them clearly. But without it being necessary to examine if the parties have employed in the "compromis" the expression of "dénégation de justice" as an exact equivalent of the term of "denial of justice," which is generally adopted by legislation, jurisprudence and theory, it is permissible to maintain that article 5 above assimilates fully to denial of justice

as to their effects, illegal delays of procedure, want of execution of final decrees, flagrant violations of law committed under the appearance of legality, in all which cases diplomatic intervention is declared admissible provided they concern affairs coming within "the competency of civil or penal justice." . . . In consulting the general principles of public law upon denial of justice, that is to say, the rules common to the most of legislation or taught by theory, one comes to believe that denial of justice comprehends not only refusal of a judicial authority to exercise its function, and notably to pass upon petitions submitted to it, but also persistent delays on its part in pronouncing its decrees. . . . In reality the contracting parties seem to have wished to attribute to the words "*dénégation de justice*" their most extended signification, and to include in them all the acts of judicial authorities implying a refusal, direct or disguised, to render justice.

79. Let us further consider, however, what is meant by the term "denial of justice," or notorious injustice. In the Cotesworth & Powell case (Moore, 2083) it was said :

Nations are responsible to those of strangers . . . 1st, for denials of justice ; and, 2d, for acts of notorious injustice. The first occurs when the tribunals refuse to hear the complaint, or to decide upon petitions of complainant, made according to the established forms of procedure, or when undue and inexcusable delays occur in rendering judgment. The second takes place when sentences are pronounced and executed in open violation of law, or which are manifestly iniquitous. With respect to the case under consideration, the undersigned concludes that the government of Colombia is responsible to that of the claimants, if justice had been denied them, or if they have been the victims of notorious injustice, in cases admitting of no doubt ; provided all modes of appellate revision were exhausted, and the executive power, representing the nation (irrespective of its internal distribution of governmental functions) to foreign powers, had notice of the fact and refused redress.

We may properly believe that the last clause, claiming necessity of notice of the fact to, and refusal of redress by, the executive power, states the case too broadly, for an infinite number of complaints have been heard before commissions, and decided favorably to the claimant, where no express notice whatever had been given to the executive power, and where there had been therefore no refusal of redress. It is believed that the law is hereafter accurately stated when it is pointed out that there may be a denial of justice either by the executive or by the courts, and it is further believed that there is no conclusive authority to the effect that the double denial of justice should take place before relief could be asked.

The rule was again stated in the Cotesworth & Powell case (Moore, 2081) as follows :

It is only in cases where justice is refused, or palpable or evident injustice is committed, or when rules and forms have been openly violated, or when odious distinctions have been made against its subjects, that the government of the foreigner can interfere.

Of course it is true, as again held in the same case (Moore, 2082), on the authority of Phillimore (Vol. II, Chaps. I and II), that "it behooves the government interfering to have the greatest care, first, that the commission of wrong be clearly established; and, second, that the refusal of the tribunals to decide the case at issue, be no less clearly established."

Nevertheless it was held in the Salvador case (Foreign Relations of 1902, 870) as follows:

It is not the denial of justice by the courts alone which may form the basis for reclamation against a nation, according to the rules of international law. "There can be no doubt," says Halleck, "that a state is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the government, so far as the acts are done in their official capacity."

And on page 871 there is quoted with approval the following from Mr. Fish to Mr. Foster: "Justice may as much be denied when it may be absurd to seek it by judicial process as if denied after being so sought."

Bearing out this idea, and after discussing the general proposition of international law that in the event of wrongdoing the courts must first be appealed to before a claim can be brought within the jurisdiction of an international tribunal, it is added:

If the government of Salvador had not intervened to destroy the franchise and concession of El Triunfo Co., and thus despoiled the American shareholders of their interest in that enterprise, an appeal might have been, as it was evidently intended to be, made to the courts of Salvador for relief from the bankruptcy proceedings. The first step to that end would be the turning out of the conspiring directors and the installment of a proper directorate by the supreme authority of the corporation, the shareholders' meeting. But by the executive decrees, rather than by the bankruptcy proceedings, the property rights of the American citizens involved were irrevocably destroyed.

So in the Davy case (Ven. Arb. of 1903, 410) it was said:

It is also urged by the Honorable Commissioner for Venezuela that the claimant should find his adequate remedy by civil action through the courts of Venezuela, directed against the man or men who had done him this harm. He had this right, without question, but in the judgment of the umpire he was not compelled to resort to the courts for his remedy. He had recourse to the government of which he was the subject, there to obtain his relief through diplomatic channels. The government of which he is a subject has a right to represent his interests diplomatically, and where, as in this case, there has been an agreed submission of the claims of British subjects to a mixed commission created to consider them the tribunal thus constituted has undoubtedly jurisdiction of the parties and of the subject matter.

In the Ballistini case (Ven. Arb. of 1903, 503), Paul, delivering an opinion in the conclusion of which his French associate concurred,

granted an award for the arbitrary action of a Venezuelan judge, which proved "the denial of justice, because the local authorities deprived Ballistini of the legal means of instituting before the competent tribunals the actions which the laws would authorize him in case he might improperly have been condemned to a criminal judgment." So in the Garrison case, before the Mexican Commission (Moore, 3129), a claimant was excused from perfecting an appeal, the court having acted with great irregularity and even violence, and an appeal being prevented by intrigues or unlawful transactions.

80. In the line of what we have already said, Bertinatti, umpire of the Costa Rican Commission (Moore, 2317), in the Medina case, held that, "it being against the independence as well as the dignity of a nation that a foreign government may interfere either with its legislation or the appointment of magistrates for the administration of justice, the consequence is that in the protection of its subjects residing abroad a government, in all matters depending upon the judiciary power, must confine itself to secure for them free access to the local tribunals, besides an equality of treatment with the natives according to the conventional law established by treaties. Only a formal denial of justice, the dishonesty or *prevaricatio* of a judge legally proved, 'the case of torture, the denial of the means of defense at the trial, or gross injustice, *in re minime dubia*' (see opinion of Phillimore in the controversy between the governments of Great Britain and Paraguay) may justify a government in extending further its protection."

The doctrine above laid down was followed, particularly as showing the necessity for exhausting judicial appeals, in the Corwin case, United States and Venezuelan Claims Commission (Report, 119; Moore, 3220), and the Driggs case, same commission (Report, 91).

81. An interesting case of denial of justice was that of Tagliaferro, (Ven. Arb. of 1903, 764), an Italian subject who had been required to meet certain enforced exactions, under penalty, in case of refusal, of being conducted to prison. The claimant refused payment, was imprisoned, and immediately applied for relief to the courts, but failed, the judge contending that the martial power was superior to the civil. On addressing a petition to the Procurador General of the state, asking to be set at liberty, he was permitted to again apply to the courts, producing documents showing that he was an Italian subject, without which requisite he was told nothing could be done. The umpire found that "the offenses complained of now are double in nature, consisting of unjust imprisonment and denial of justice. The only cause for imprisonment was the nonpayment of an illegal exaction.



Clearly this affords ground for recovery. That there was a denial of justice is likewise evident. Military authority could not justly override civil authority, as the superior judge seemed to admit, and it was immaterial whether the claimant were Venezuelan or Italian, although the procurador refused relief because of a supposed lack of proof of Italian citizenship."

82. In addition to the cases already cited, coming before the Mexican-American Claims Commission under the treaty of 1868, we may refer to the Burn case (Moore, 3140), wherein the claimant failed for want of having pursued his grievance to the superior court; the Schooner *Ada* case (Moore, 3143); and the Jennings, Laughland & Co. case (Moore, 3135), involving the same principle.

83. In the Baldwin case, before the Mexican Claims Commission of 1839 (Moore, 3126), but undecided by the umpire for lack of time, afterwards considered by the commissioners under the act of Congress of 1849, the claim was rejected, the claimant not having exhausted his legal remedies for wrongful seizure of property by the Mexican authorities and there being nothing in the proceedings to show "that a denial of justice was meditated or likely to ensue to the claimant."

84. In the Schooner *Ana* case (Moore, 3144) the excuse suggested, that the judge did not inspire confidence because owing his appointment to the authorities of whose acts claimant complained, was not regarded as offering sufficient reason for failing to appeal to the local courts.

So in the Pratt case (Moore, 3141), Thornton, umpire, found that the claimant had not availed himself of the opportunity either to prove his title in court or to take an appeal, and that therefore there had been no denial of justice.

In the Driggs case before the United States and Venezuelan Claims Commission of 1889 (Report, 410) it appeared that the case had been dismissed "because Driggs failed to comply with the order of court to give security of costs. He differed with the court as to the legality of such an order. It is enough to say he should have sought his remedy, if wronged, in the superior tribunal, and having failed to do so, he has none here."

85. In the matter of the Panama Riot Claims (Moore, 1413) it was said:

It is an admitted principle of international law, that parties who are aggrieved by the unlawful acts of the public authority are bound to exhaust every legal means given by the constitution of the country to have the legality declared and the acts

overruled. But if they, being foreigners and entitled under treaty to appeal to the courts of law, neglect to do so, they are not entitled to invoke the intervention of their government to obtain for them indemnity. A protest, whether made by the parties themselves or by counsel, cannot be held to supply the place of an appeal to a legal tribunal competent to deal with the subject matter, nor does it render the right to intervention perfect and complete.

**86.** So before the Spanish Commission in the cases of Danford, Knowlton & Co., and Peter V. King & Co. (Moore, 2194 and 3149) it was held :

These claimants not having furnished any proof whatever of a denial of justice on the part of the Spanish authorities or of the Spanish tribunals, they are not entitled to appear before this commission. . . . They should prosecute their claim before the local tribunals in the island of Cuba, which afford a full and complete remedy for their case.

In this opinion the Spanish and American commissioners united, but in the later case of Young, Smith & Co. (Moore, 3148), Baron Blanc, umpire, held that the protocol had conferred upon the commission jurisdiction "of all claims for injury of that character [unlawful seizure by Spanish authorities of property belonging to American citizens]. It makes no exception against those parties who may not have resorted to or exhausted the remedies offered by the courts of Cuba. The umpire, therefore, is constrained to hold that this is a proper case for the exercise of the jurisdiction of the commission, and that he is himself bound to decide on the merits of the demand presented by the claimants."

It appears, however (Moore, 3151), that in the first two of these cases the seizure of the property was held to be lawful, and that the proceeding which the claimants instituted for the protection of their interests was voluntarily abandoned by them before its conclusion, although their rights had in substance already been recognized by the authorities. Moreover, the proceeding involved the winding up of the Cuban firm's affairs (with which the claimants had been associated), which was not only yet to be performed, but which peculiarly pertained to the local tribunals.

**87.** The subject received some discussion by Herran, umpire of the Peruvian Claims Commission, Montano case (Moore, 1637), he saying :

The obligation of a stranger to exhaust the remedies which nations have for obtaining justice, before soliciting the protection of his government, ought to be understood in a rational manner, that such obligation does not make delusive the rights of the foreigner. After Montano had obtained a definite sentence that the

sum of money should be paid him, which the court determined as a just indemnification for his damages and losses which he had suffered through the fault of a pilot accredited by the laws of California, who for the payment of that sum had furnished securities in fulfillment of a law of the state, one ought to believe that the claimant had only to put the writ in execution to pay the cost, but such was not the case.

**88.** Among the more recent cases is that of the La Guaira Electric Light and Power Co. (Ven. Arb. of 1903, 178, 182 ; Morris's Report, 406), in which it was said :

In order to bring this claim within the jurisdiction of the commission, it was, in our judgment, incumbent upon the claimant to show a sufficient excuse for not having made an appeal to the courts of Venezuela open to it, or a discrimination or denial of justice after such appeal had been made. As the claim stands, it is merely a dispute between a citizen of the United States and a citizen of Venezuela in regard to their respective rights under the terms of a certain contract. It has not the necessary basis for an international reclamation. The case is very different from one in which the government itself has violated a contract to which it is a party. In such a case the jurisdiction of the commission under the terms of the protocol is beyond question.

**89.** In the De Caro case (Ven. Arb. of 1903, 810) complaint was made because an excessive amount of goods had been seized by order of the court to meet a judgment, but the umpire said :

If De Caro believed that the Judge of Hacienda had directed the seizure of an excessive amount of property, he had the right under the code of civil procedure of Venezuela to appeal to the court for the release of the excess, in this respect enjoying the remedy to which he would be entitled under similar circumstances in a common-law country. It does not appear that he availed himself of his rights, and it is not within the power of this umpire to grant damages to a claimant who, by a seasonable reliance upon his rights in a case in court, might have suitably protected himself. Certainly before he can appeal to an international tribunal, the suit in court having long since terminated, he should be prepared to show some actual denial of justice with relation to the subject matter of his appeal.

**90.** In the Company General of the Orinoco case, French-Venezuelan Claims Commission of 1902 (Report, 244), the complainant having had an opportunity to test the worth of its contentions by an appeal to the high federal court, and having failed to avail itself of the opportunity, without excuse, the umpire considered the claimant in such respect in default.

**91.** In the examination of the foregoing citations and such further discussion of the subject as occurs in this volume, it will not be overlooked that the doctrine of the necessity of the exhaustion of legal remedies and of a final denial of justice applies particularly to those cases where justice has been sought against a private individual and

has failed, while rarely has it been maintained that, the wrong being committed by the government or its agents, as, for instance, through the violation or nonperformance of its contract obligations, the party injured should proceed first in the courts of the offending government before the arbitral tribunal would take jurisdiction.

This general subject will receive further consideration when discussing the liability of governments for the acts of their officers and others.

92. An unusual case was presented before the Mexican Commission under the treaty of 1868, in that of the inhabitants of Cinecue (Moore, 3127), who complained of an act of the legislature of Texas by which a part of their town which had been separated from the rest by a change in the course of the Rio Grande was incorporated into the town of La Isleta, Texas. The commission, Sr. Palacio delivering the opinion, held that the case was not one for international action, there being judicial remedies that could be pursued. The opinion referred to the judicial remedies, ordinary and extraordinary, which had been devised in the United States for the protection of vested rights of property.

#### EFFECT OF LOCAL LAWS BEFORE COMMISSIONS

93. The Venezuelan protocols of 1903 provided for the determination of all claims before commissions "upon a basis of absolute equity without regard to . . . provisions of local legislation." The meaning and application of the words "local legislation" in this connection were notably discussed by Plumley, umpire of the British-Venezuelan Commission, in the Aroa Mines case (Ven. Arb. of 1903, 344, 378), he holding :

By a proper application of the usually accepted international law governing such commissions, controlling courts, and defining the diplomatic conduct of nations, there could be no question that national laws must yield to the law of nations if there was a conflict. . . . The definition of international law, making it under one form of expression and another the rules which determine the great body of civilized states in their dealings with one another, necessarily excludes state statutes from doing the same thing. . . . The right of states to give protection to their subjects abroad, to obtain redress for them, to intervene in their behalf in a proper case, which generally accepted public law always maintains, makes these municipal statutes under discussion in direct contravention thereto and therefore inadmissible principles by those states who hold to these general rules of international law.

The umpire found adequate reason for this unusual provision, although the principle it represented was far from being out of the ordinary, in the fact that Venezuela had contended that its laws were paramount in matters of claims, and might be expected so to maintain

before a mixed commission, unless there was such a direct expression in the protocol as we have quoted.

94. A like provision received the consideration of Ralston, umpire, in the Brignone case (Ven. Arb. of 1903, 710-719), his interpretation being as follows :

This unusual provision is to receive a rational and not a strained interpretation, and in the umpire's opinion amounts simply to saying that any local legislation which operates against equity shall be rejected. An extended interpretation rejecting any and all local legislation would at once defeat the very purposes of the commission, as may well be illustrated by the present case. Mrs. Brignone was married in Venezuela under Venezuelan laws. Deny efficacy to these laws, and no marriage existed, for marriage is, in civilized nations, regulated by law. Her deceased husband acquired a complete interest in partnership assets from his associate (the partnership itself being created in accordance with the provisions of local laws) by virtue of laws providing for such transfers. Proofs in this or in other cases have been taken before judges created by local laws and in the manner they provide. Reject local laws indiscriminately and the whole fabric of sworn testimony built up in more than three hundred cases presented or to be presented to the commission absolutely fails.

95. Discussing the same subject, Duffield, umpire of the German Commission, in the Brewer, Möller & Co. case (Ven. Arb. of 1903, 595, 596), said :

The parties to the protocol primarily intended by these words, it is quite evident, that Venezuela should be estopped from insisting upon the general provision in her law requiring foreigners as well as citizens to present their claims against the government to the courts of Venezuela. Incidentally, of course, like provisions of local legislation were intended to be excluded ; but it cannot be presumed that all the laws of Venezuela with reference to the formation of corporations, or of partnerships, or of limited associations, or in respect to the rights and obligations of holders of real estate were so included. Neither can it be reasonably presumed that it was intended to estop Venezuela from invoking the provisions of local legislation to which foreigners, by associating themselves with Venezuelans, and by their voluntary and solemnly executed consent, had agreed. *A fortiori* must this be the case under circumstances like those under consideration, where, by the agreement between the foreigners and the Venezuelan citizens, the foreigners expressly stipulate that all right of property in the effects of the association shall be vested in the Venezuelan citizen.

96. In the *Montijo* case (Moore, 1440) the umpire held that the treaty was "superior to the constitution, which latter must give way. The legislation of the republic must be adapted to the treaty, not the treaty to the laws." We have elsewhere pointed out the difference between the attitudes, upon this particular point, of this umpire and of Morse, arbitrator in the Van Bokkelen case (Moore, 1813), who maintained the supremacy of the national constitution over treaties.

97. The necessary control of local legislation over questions of heirship and succession was recognized in the opinion of Upham, American commissioner of the British-American Commission of 1853, Cook et al. case (Report, 166 ; Moore, 2315), he saying :

No instance can be found of the interference of government with the question of ordinary heirship and succession of estates in other jurisdictions. They are ever left to local action and jurisdiction of the courts of the countries where situated. There is every reason why it should be so.

So the same commissioner, speaking for the commission in the Kenworthy case (Report, 334, 337), referring to the treaty between the two countries, which provided that " the merchants of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively," said :

It was manifestly contemplated in this provision that citizens or subjects of either government, resident in the country of the other, engaged in commerce, should be subject to the laws of the country where they reside, in all ordinary matters pertaining to such commerce. The adjudication of suits arising out of the collection of the revenue is certainly a matter of local jurisdiction by the courts of the country, and there can be no appeal from them to this tribunal.

98. Likewise in the Rutty case (Boutwell's Report, 93 ; Moore, 2401) the effect of local laws was recognized as permitting the passage of an international claim from the claimants to the assignees in bankruptcy.

99. In the Baldwin case (Moore, 2864), before the commission between the United States and Mexico of 1839, the umpire in an interlocutory opinion advised the commission that in determining the propriety of certain claims for torts inflicted upon the claimant, it was necessary " to ascertain what rules are observed in that regard by the Mexican courts of justice and especially by the supreme courts. The result of that examination will serve as a guide for the decision of the claim of Mr. Baldwin touching the damages and prejudices suffered by him. It will then be necessary to prove all the facts on which, according to the principles of Mexican law (in so far as they do not infringe the general principles recognized in the law of nations), depends the question of the amount of damages, whether for the attacks on his liberty or for the seizure of his effects. As to the gain of which Mr. Baldwin states that he was deprived by the seizure of his effects, it will be necessary especially to examine whether, according to the principles of Mexican law, damages in respect of a profit of which the injured individual has been deprived comprise only that which follows the injury directly and immediately."

100. Differing somewhat from the idea of the umpire just cited, the majority of the British-American Commission of 1871 (Hale's Report, 61) overruled a demurrer in the Brain case for injuries said to have resulted in the death of the intestate, and where there was no allegation in the memorial of any local statute allowing damages in favor of personal representatives for a wrongful injury causing death.

101. In the Massiani case, French-Venezuelan Claims Commission (Ralston's Report, 211), the umpire recognized fully the sanctity of local legislation determining who were to be her citizens, Venezuela having in this regard "no peculiar or offensive laws, but rather . . . those which accord with the law of nations in general."

102. Nor may the party injuriously affected by the provisions of local legislation ordinarily claim therefor before an international tribunal, for, as was said in the Morrill case (United States and Venezuelan Claims Commission of 1889, 37; Moore, 3026), "to assert as a principle of international law that the citizens of one country injuriously affected by the enforcement of the municipal regulations of another, had good cause for reclamation in the absence of any proof whatever that the offending country had wantonly or maliciously abused its power," would be "a doctrine at war with all authority and practice, and the very statement of which carries with it its own refutation."

103. A case of perhaps doubtful soundness was that of the *Albion* before the United States and Great Britain Claims Commission of 1853 (Report, 376; Moore, 4388), the essential part of the syllabus of which is as follows:

A British vessel was seized for cutting timber and trading with the Indians in the Oregon territory without license. Application was made to the government at Washington, requesting, as a measure of clemency, that the vessel might be released. Answer was sent that she might be released, if there had been no legal condemnation of the vessel; the answer did not arrive seasonably, and the vessel was condemned and sold.

The umpire, the commissioners disagreeing, "on consideration of the question of damage, awarded twenty thousand dollars on account of the hardship of the case, and for the reason that the remoteness of the territory was such as to prevent the clemency intended by the government seasonably reaching them."

104. Exceptions to the rule of local laws controlling within a territory covered by them are referred to elsewhere and were involved in the *Creole* case (United States and Great Britain Claims Commission of 1853, 241; Moore, 4377), the umpire saying:

A vessel navigating the ocean carries with her the laws of her own country, so far as relates to the person and property on board, and to a certain extent retains those rights even in the ports of the foreign nations she may visit. . . . The municipal law of England cannot authorize a magistrate to violate the law of nations by invading with an armed force the vessel of a friendly nation that has committed no offense, and forcibly dissolving the relations which by the laws of this country the captain is bound to preserve and enforce on board. These rights, sanctioned by the law of nations, — viz. the right to navigate the ocean and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers the laws of her own country, — must be respected by all nations, for no independent nation would submit to their violation.

105. So the law of nations forms a part in fact of local laws, for in the same case the umpire said :

The other slaves, being perfectly quiet, and under the command of the captain and owners, and on board an American ship, the authorities should have seen that they were protected by the law of nations, their rights under which cannot be abrogated or varied, either by the emancipation act or any other act of the British Parliament. Blackstone, Vol. IV, speaking of the law of nations, states : " Whenever any question arises which is properly the object of its jurisdiction, such law is here adopted in its full extent by the common law."

As is of course well understood and discussed elsewhere, the United States has adopted international law as a part of its national law.

#### RIGHT TO REVIEW POLITICAL QUESTIONS

106. Not every question presented to an international tribunal, even if involving wrong committed by a foreign government to the citizens or subjects of the claimant nation, will be considered. Alexander McLeod, a citizen of Canada, was arrested in the state of New York, charged with a criminal offense, arising because of his having engaged in the destruction of the steamer *Caroline* in New York, with a party from Canada, during an insurrection in that province. Great Britain had demanded his release on the ground that the act complained of was done by the orders of that government, and that it was responsible and not the individual, and the difficulties arising from this cause were afterwards adjusted between the two countries, the British government assuming responsibility and pleading justification on the ground of urgent necessity. Bates, umpire (Report of Decisions of the Commission of Claims between the United States and Great Britain, 327 ; Moore, 2425), said :

From this time the case of the claimant became a political question between the two governments, and the United States used every means in their power to insure the safety of the claimant, and to procure his discharge, which was effected after



considerable delay. It appears by the diplomatic correspondence that the affair of the *Caroline*, the death of Durfee, who was killed in the affray, and the arrest of the claimant, were all amicably and finally settled, by the diplomatic agents of the two governments in 1841 and 1842. The question, in my judgment, having been so settled, ought not now to be brought before this commission as a private claim.

107. So in the Howard case (Moore, 2429), the claimant having received at the request of the United States a conditional pardon, the umpire of the Spanish Commission refused an award, treating the case as closed through political action.

108. In the Faber case (Ven. Arb. of 1903, 600) relief was denied for injury to the subjects of the claimant government arising out of the closing by the government of navigation upon the rivers Zulia and Catatumbo, and the umpire (page 630) held :

There is no contradiction of authority as to the right of Venezuela to regulate, and, if necessary to the peace, safety, or convenience of her own citizens, to prohibit altogether navigation on these rivers. It is also equally without doubt that her judgment in the premises cannot be reviewed by this commission or any other tribunal.

109. By parity of reason, the umpire in the Sambiaggio case (Ven. Arb. of 1903, 666, 692) said :

It is suggested that a decision holding Venezuela not responsible for the acts of revolutionists would tend to encourage them to seize the property of foreigners. This appeal is of a political character and does not address itself to the umpire.

110. In the Orinoco Steamship Co. case (Ven. Arb. of 1903, 72, 95 ; Morris's Report, 266), Barge, umpire, maintained that the right to open and close, as a sovereign on its own territory, harbors, ports, and rivers, to prevent trespassing on fiscal laws, or in self-defense, could not be denied, and a claim for damages therefor could not be sustained. The existence of this right, no contract relations justifying damages, was also recognized in the Poggioli case (Ven. Arb. of 1903, 847, 870).

111. It will be borne in mind, however, that responsibility may exist against a government even for purely governmental acts, otherwise proper, if their performance involves a violation of contracts. Thus in the Martini case (Ven. Arb. of 1903, 819, 843), the umpire referring to the change of character of a port by government order, such change cutting off its foreign commerce, said that " this closure, while entirely legal and within the power of the government as against the world at large, rendered the government liable to an extent hereafter to be discussed, under its original contract with claimant's predecessors."

## JURISDICTION OVER BOND CLAIMS

**112.** A great divergence of opinion has existed as to whether bonds may in any instance form the subject of a claim before an international tribunal, some umpires apparently failing to properly differentiate between the frequent indisposition of the diplomatic branch of the government to the presentation of such claims, as involving matters of contract, and the entirely different question of the right of a commission, when once appointed, to pass upon them as constituting a claim under the language of the protocol. Of course a government may often refuse, for reasons of expediency, to press a demand against another nation, to the right of presentation of which when brought before an international tribunal no valid objection could be urged.

In our judgment the misunderstandings on the part of commissions, where they have existed, have grown out of misapprehension of the real meaning of the words of Lord Palmerston (Hall, fourth edition, 294, note), he saying :

As some misconception appears to exist in some of those states with regard to the just right of her Majesty's government to interfere authoritatively, if it should think fit to do so, in support of those claims, I have to inform you, as the representative of her Majesty in one of the states against which British subjects have such claims, that it is for the British government entirely a question of discretion, and by no means a question of international right, whether they should or should not make this matter the subject of diplomatic negotiation. If the question is to be considered simply in its bearing on international right, there can be no doubt whatever of the perfect right which the government of every country possesses to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the government of another country, or any wrong which from such foreign government those subjects may have sustained; and if the government of one country is entitled to demand redress for any one individual among its subjects who may have a just but unsatisfied pecuniary claim upon the government of another country, the right so to require redress cannot be diminished merely because the extent of the wrong is increased, and because instead of there being one individual claiming a comparatively small sum, there are a greater number of individuals to whom a very large amount is due.

It is therefore simply a question of discretion with the British government whether this matter should or should not be taken up by diplomatic negotiation, and the decision of that question of discretion turns entirely upon British and domestic considerations.

It might happen that the loss occasioned to British subjects by the nonpayment of interest upon loans made by them to foreign governments might become so great that it would be too high a price for the nation to pay for such a warning as to the future, and in such a state of things it might become the duty of the British government to make these matters the subject of diplomatic negotiation.

113. The most important case in which claims for national bonds have been discussed was that of Aspinwall, executor, before the United States and Venezuelan Claims Commission of 1889 (Report, 297; Moore, 3616), wherein recovery was sought upon Venezuelan bonds. The question largely considered by Mr. Little, who delivered one of the majority opinions, was as to whether such a demand constituted a "claim" within the meaning of the protocol. After a long discussion he held the word "claims" broad enough to apply, distinguishing the protocol from that between the United States and Mexico, which contemplated the adjustment "of all claims on the part of . . . citizens . . . arising from injuries to their persons or property," recognizing under such circumstances the possible propriety of the exclusion of such as might arise *ex contractu*, as was held by Sir Edward Thornton, umpire of the commission formed under that protocol, interpreting his ruling as so holding, "not because, however, they were not embraced within the meaning of the general term, but because they did not fall within the terms of the qualification." Judge Little referred to the fact that under the convention of 1868, between Great Britain and Venezuela, a large number of claims upon Colombian bonds assumed by Venezuela had been granted.

Mr. Findlay of the same commission reached a like conclusion, from which Andrade, Venezuelan commissioner, emphatically and at length dissented (Moore, 3651, 3664).

It is noteworthy that the Ecuadorian Claims Commission arrived at a similar result, although no opinions appear to have been filed, allowances having been made by it for payment upon a number of Colombian bonds (Moore, 1575, 1576).

Sir Frederick Bruce, umpire of the United States and Colombian Commission (Moore, 3615), declined, however, to recognize bonds as a rightful subject for award, saying :

The government of the United States, like that of Great Britain, has not laid down or acted upon the principle that the citizen, who holds an interest in the public debt of a foreign country, and who in common with the other shareholders in that debt is unable to obtain payment of what is due to him, is entitled as of right to the same support in recovering it as he would be in a case where he has suffered from a direct act of injustice or violence. The government reserves to itself on special grounds the right to determine when and under what conditions such support shall be given, and this commission cannot assume upon the strength of a general term, and in the absence of express language to that effect, that the government of the United States intended to delegate to it powers which it has not exercised itself in a matter of so much delicacy.

It will be seen from the foregoing that, referring substantially to the same subject matter, — that is to say, bonds resting upon the whole debt of Granada, assumed by the several countries into which it was divided in the proportion of 50 per cent by Colombia, 28½ per cent by Venezuela, and 21½ per cent by Ecuador, — Colombia escaped international responsibility upon a part of her proportionate assumption, while Ecuador and Venezuela were held.

114. We have already referred, in discussing the opinion of Judge Little, to the attitude of Sir Edward Thornton with relation to the bond question. It remains to be added that in the *Widman case* (Moore, 3467) he remarked :

But even if General Placido Vega had been fully authorized to pledge his government to the payment of such a loan [that before the commission], the umpire considers that the claimants have no more right, if so much, to come before the commission for a settlement of their claim, than if they had bought Mexican bonds in the open market, a right to which the umpire would in no case hold them to be entitled.

The two commissioners associated with him evidently entertained like views, as appears from their opinions in the *Coupon case* (Moore, 3616), the opinion of Zamacona, Mexican commissioner, being based largely upon the ground that the coupons might have come into the hands of the claimants from some one who was not an American citizen, and that of Wadsworth, American commissioner, that it had not appeared with sufficient clearness that the government had agreed to refer such claims to the commission.

115. The most important case in which the subject received discussion before the recent Venezuelan commissions was that of the *Belgian Waterworks* (Ven. Arb. of 1903, 271), wherein the Belgian claimant sought to recover for the entire issue of bonds, whether itself at the time their owner, or in possession of them, or not, and the bonds being payable to bearer. Grisanti, Venezuelan commissioner, rested his opposition to the allowance of the claims largely upon the nonproduction of the bonds and the fact that they were payable to bearer, it being therefore impossible to determine the owners' nationality, saying:

If the owner of a bond payable to bearer has not got the right to recover it from its actual possessor, except it may have been stolen or lost, how can it be just that the *Compagnie Générale des Eaux de Caracas* should claim from the government of Venezuela the payment of all the bonds of the special debt of the waterworks of Caracas, without showing that it is the owner of all of these bonds? The *Compagnie Générale des Eaux de Caracas* is not vested with any legal right to represent the bearers of the bonds of the waterworks debt nor does there exist between it and them any legal relation; and this being so, on what principle of equity and justice can it rely to demand the payment of the sum total of said debt?

For answer to this, Filtz, umpire, contented himself with saying :

That Article 1 of the protocol of Washington declares that the commission had jurisdiction to examine and decide all Belgian claims against the Republic of Venezuela which have not been settled by diplomatic agreement between the two governments, and which may have been presented to the commission by the Belgian government or by the legation of Belgium at Caracas. That the present claim has not been settled by diplomatic agreement between the two governments, and that it has been presented to the commission by the agent of the government at Caracas. That the claimant company's Belgian character has not been disputed, and that it has not lost it, because among the holders of the bonds which have been issued by the government of the republic persons of a different nationality are found.

It will be observed that the very question before the umpire was whether a claim for bonds could be presented by a person not an owner, and whether, the owner of particular bonds being unknown, and the bonds not being produced, he could state that a claim for them was one of the "Belgian claims" referred to the commission.

The umpire, in his opinion (Ven. Arb. of 1903, 290), gave judgment for the full amount of the bonds, and directed each installment paid by Venezuela to be delivered to a bank in Brussels and the amount to be divided by the total number of bonds outstanding, provided, however, that at the time of the last installment the bonds should be perforated for cancellation, and any amount left there returned to the government of Venezuela, with the exception of the sum necessary to take up at par bonds which had not been presented, such return to take place when the term of prescription should have run out. We need not comment upon the character of this award.

116. In the Ballistini case (Ven. Arb. of 1903, 503) (reported as Battistini case, Ralston's Report, French-Venezuelan Commission, 459), it was sought to make Venezuela responsible for certain bonds of the state of Guayana, and Paúl, Venezuelan commissioner, the French commissioner uniting in his conclusion, said :

The claimant has not presented the original bonds or any part of them which he may have in his possession. The failure to present said bonds makes an appreciation regarding the legitimacy of the claim impossible because its essential foundation, which is the ownership or existence under the control of Ballistini of such certificates or bonds and the exact ascertainment of their amount, is wanting.

Undoubtedly the reason so far assigned for the refusal of the award was sufficient in itself. The commissioner, however, in further discussing the case said :

It is a principle of public international law that the internal debt of a state, classified as a public debt, which is subject to speculations current amongst that

sort of values which are acquired freely and spontaneously at very different rates of quotations which mark great fluctuations of their rise and fall, can never be the subject of international claims in order to obtain their immediate payment in cash.

In view of the authorities heretofore cited, the soundness of this statement may well be doubted.

117. Before the Italian-Venezuelan Commission in the Boccardo case, not reported, but referred to in a note (Ven. Arb. of 1903, 505), the umpire, relying upon the Aspinwall case, *supra*, found no difficulty in giving an award based upon bonds of the internal debt of Venezuela, but required absolute proof that the bonds had been delivered directly to the Italian claimant, by the government, and had never left his possession. Furthermore, at the time of signing the award he required the physical production of the bonds and their cancellation, the bonds being produced from a receptacle in which they had been deposited immediately upon their issuance. As the bonds were payable to bearer, without such proof an award ought not to have been rendered, in view of the fact that in the course of their history, had it been traced, it might have appeared that the claim had lost its character as Italian.

118. The only other case before the Venezuelan commissions, involving the question of bonds, was that of Jarvis (Ven. Arb. of 1903, 145; Morris's Report, 301), referred to in another connection. Bainbridge, commissioner, delivering the opinion of the commission, in which Paúl, who had decided the Ballistini case, joined, did not rest his opinion in any degree upon the nature of the claim as relating to bonds, but rejected it because of the fact that such bonds had been issued to an American citizen to obtain assistance in an attempt against the then legitimate authorities of Venezuela, thus involving violation on the part of an American citizen of the neutrality laws of his nation.

119. As we shall see under another heading, the United States, through its demolition of the Confederate government and the possession of its assets, assumed no liability for the payment of Confederate bonds (Barrett case, Howard's Report, 60; Hale's Report, 154; Moore, 2900).

Again, as will be shown elsewhere, the United States was not held responsible before the United States and Great Britain Claims Commission of 1853 for bonds issued by Texas before its union with the United States (Report, 382; Moore, 3591), or for the territorial bonds of Florida (Report, 246; Moore, 3594).

120. The Franco-Chilean Arbitral Tribunal, in its decision (Opinion, 251), indicated the distinction between what is known as the internal and what is known as the external debt of a state, expressions much used among South American countries; and from this decision it appears to be recognized that an internal debt is one contracted within the country and an external debt is the result of a loan made abroad. As applicable to the particular question before the court, the distinction was treated as unimportant, and bondholders whose bonds were issued upon the security of beds of guano, from the proceeds of which the moneys in dispute were derived, were allowed to recover, irrespective of nationality, even where the nationality in question was Peruvian, the original pledge having been made by Peru, this conclusion being arrived at under the peculiar wording of the protocol itself.

#### TECHNICAL OBJECTIONS

121. Commissions do not look with favor upon merely technical objections, and protocols have provided, as in the case of those applying to claims against Venezuela determined in 1903, that all claims should be decided "without regard to objections of a technical nature."

As indicative of the attitude of commissions in the absence of specific provision, the question arising even as to local litigation, we refer to the Idler case (United States and Venezuelan Claims Commission of 1889, 139, 187), wherein this language was used :

It is said the associates were not made parties, and are not entitled to share in the judgment. This, at least, is a technical objection. If the debt was owing, it seems of little importance, before the bar of international justice, in whose name the suit was conducted, so the right ones get the proceeds. Had the associates been made parties, we cannot see that the result for that reason would have varied. Idler always recognized their interest in the claims and judgment, and it is not apparent how the question now is material.

122. Nevertheless, the question remains open as to what is or is not a technical objection, and in the case last referred to the following language occurs in the opinion (Report, 169) :

The objection to this record is by no means technical. No notice, legal or other, was received or sent to Jacob Idler about the suit in the Superior Court, the only court having jurisdiction to entertain it in the first instance (unless it be the Treasury Court where it never was), as is conceded on all hands. The letters rogatory directed him to appear in the *Supreme Court*, in a suit instituted *there*. If the summons was legal, it only gave him notice of what that court *in that case* — not in another instituted in an inferior tribunal and subsequently appealed to it — might lawfully adjudge. The notice directing him, away in a distant land,

to appear in one court when the business affecting his interests was to be done in another, was worse than none at all, for it was misleading. Even if no notice had been required, and one had nevertheless been given, whose tendency was thus to mislead, we are inclined to think the act, from the standpoint of justice, would vitiate the whole proceeding.

**123.** It would seem perfectly evident that a plea that the claimant does not belong to the claimant nation, going as it does to the right of recovery, could not be a technical objection, and thus it was held in the *Brewer, Möller & Co.* case (Ven. Arb. of 1903, 595).

**124.** A singular view was taken by Gutierrez-Otero, umpire of the Spanish-Venezuelan Commission, in the *Padrón* case (Ven. Arb. of 1903, 923), where, after holding as a general rule of international law that a government was not responsible for injuries inflicted by unsuccessful revolutionists, he maintained the responsibility of Venezuela on the ground that such objection to the right of recovery was of a technical nature. The same umpire in the *Mena* case (Ven. Arb. of 1903, 931) followed the rule so laid down by him.

Discussing this position in the *Guastini* case (Ven. Arb. of 1903, 730, 748), involving the same principle, Ralston, umpire of the Italian-Venezuelan Commission, said :

It is also true that the umpire of the Spanish Commission, notwithstanding his apparent belief as to their illegality, has granted claims of this nature, considering the objections raised thereto by Venezuela as "technical," and therefore opposed to the protocol. This view the present umpire is unable to accept, believing as he does that an objection going to the foundation of the right to recover cannot be regarded as technical.

**125.** Examining the general subject, Plumley, umpire of the British-Venezuelan Commission (*Aroa Mines* case, Ven. Arb. of 1903, 344, 380), indicated his belief that the term "technical objection" referred to "assumed lack of evidential quality in the proof offered and hence the provision," showing a manifestly different view of the meaning of the term from that which controlled Señor Gutierrez-Otero.

#### INTERNATIONAL COMMISSIONS AFFORD A REMEDY WHERE NONE BEFORE EXISTED

**126.** In the case of *Duthil & Faisans, Assignees of Camy*, before the French-American Claims Commission (*Boutwell's Report*, 92; *Moore*, 2400), the commission said :

We think the claim existed and vested in the claimant a right to relief and compensation when the acts of taking the cotton and converting it to the use of the United States were committed. True, there was no court or tribunal to



which the claimant could present his claim and obtain judgment and compensation, but his moral right existed, and the establishment of this tribunal recognized it and gave him a legal remedy for his right because no other existed. To say he has no legal right because there is no established tribunal to give him a remedy is, in a certain narrow and technical sense, true. But we think international commissions established for the very purpose of giving a remedy where none existed before stand upon a higher principle, viz. that rights to relief and compensation do exist; that they arose at the time the acts were committed; that they are recognized as rights, and that international commissions are created because, from the very nature of such acts and the claims arising from them, they do not come within the jurisdiction of any other tribunal.

#### RULES CONTROLLING DECISIONS

127. That commissions must in their determinations be controlled by the rules of international law is made manifest by the respect with which their members have always treated international law as a rule of guidance, as discussed under other headings. We have to add now particularly such references as show that equity and justice must control their action, whether particularly referred to in the protocol or not. Thus we find that, according to the Eldredge case before the Peruvian Commission (Moore, 3462), a mixed commission is "subject to no other law than that derived from the principles of justice and equity, international law and the public treaties," and in the Cadiz case (United States and Venezuelan Claims Commission of 1889, Report, 73, 79), it is said:

It is true that this commission is an international tribunal and in some sense is not fettered by the narrow rules and the strict procedures obtaining in municipal courts, but there are certain principles, having their origin in public policy, founded in the nature and necessity of things, which are equally obligatory upon every tribunal seeking to administer justice.

In the Clark and Danels cases (Moore, 2733) the opinion of Hassaurek was that "the commissioners should consider themselves not the attorneys for either the one or the other country, but the judges appointed for the purpose of deciding the questions submitted to them, impartially, according to law and justice, and without reference to which side their decision will affect favorably or unfavorably."

128. The oath provided for the commissioners under the seventh article of the Jay Treaty (Moore, 321) required them to adjudge "according to the merits of the several cases and to justice, equity and the law of nations."

The various protocols under which the commissions sat in Caracas in 1903 required the umpire and commissioners to take solemn oath

to decide "according to justice and the provisions of this convention," and provided that "the commissioners, or, in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation," and in interpreting these words so far as equity might affect the conclusion, umpire Plumley, in the Aroa Mines case (Ven. Arb. of 1903, 344, 386), held that the reference to equity "used in the protocols the umpire understands and interprets to mean equity unrestrained by any artificial rules in its application to a given case." He added:

The way is equity, the end is justice. . . . If a question arises, not readily to be apprehended, wherein equity and justice differentiate, then the former must yield, because the obligation of the prescribed oath is the superior rule of action.

In the Mena case (Ven. Arb. of 1903, 931) Gutierrez-Otero, umpire, construed his oath as justifying him in "conceding equitably what is not a matter of obligation and cannot be demanded, and, in a word, proceeding, as arbitrators proceed, that is, without regard to law." In the Padrón case (Ven. Arb. of 1903, 923, 927) he followed the same principle. Whether in these cases he did not violate a rule of right in order to reach a conclusion controlled by sympathy with apparent hardship to the individual, we have occasion to discuss elsewhere.

In the Sambiaggio case (Ven. Arb. of 1903, 666, 692) the umpire said:

It is further urged that absolute equity should control the decisions of the commission and that equitably sufferers from the acts of revolutionists should be recompensed. But this subject may be viewed from two standpoints. It is as inequitable to charge a government for wrongs it never committed as it would be to deny rights to a claimant for technical reasons. In the view of the umpire, the true interpretation of the protocol requires the present tribunal, disregarding technicalities, to apply equitably to the various cases submitted the well-established principles of justice, not permitting sympathy for suffering to bring about a disregard for law.

The same umpire, in the Mazzei case (Ven. Arb. of 1903, 693), held that the government was in equity bound to pay for property finally reaching it, though originally taken by revolutionists.

In the Boulton, Bliss & Dallett case (Ven. Arb. of 1903, 26; Morris's Report, 105), Paúl, Venezuelan commissioner, speaking for the commission, held that a claim, the benefit of which the government has received, was so far equitable, although never contracted for by the government, that it came within the purview of the protocol.

In the *Heny* case (Ven. Arb. of 1903, 14 ; *Morris's Report*, 97), umpire Barge recognized the person equitably injured as the proper claimant.

The force of equity as a rule of action in an international tribunal was also fully recognized by Plumley, umpire, in the case of the heirs of Jean Maninat, French-Venezuelan Claims Commission of 1902 (*Ralston's Report*, 44, 79), as forbidding the umpire to be generous. "He can only deal justly and equitably."

129. In his dissenting opinion in the *Rio Grande* case (*Hale's Report*, 246), Frazer, American commissioner, said that "the doctrine that this commission may, by its decisions, disregard the law of nations, in deference to whatever undefined notions of 'equity and justice' the several members of the commission may happen to entertain from time to time, is to me a very great surprise."

130. In the *Costa Rican Claims Commission* (*Moore*, 1566) it was recognized that the cases of the claimant must be adjudged in "equity."

Further applications of the word "equity" will be considered under appropriate headings.

#### REASONS FOR OPINIONS

131. The usual and proper practice of commissions is to furnish reasons for their opinions, this rule extending to the action of the umpire as well as to those of their other members. The advantages are manifest, supplying as they do a basis upon which it may be anticipated that the commissions will act in subsequent cases, and furthermore elucidating important principles of international law, thereby serving to build up a true international jurisprudence, having the sanction of precedent, and furnishing the result, not merely of the speculations of writers, however interesting or valuable such speculations might be, but the measured opinions of men of presumed competence speaking upon questions argued before them throughout their whole extent, with all the advantage of such discussion as is incident to the conflict of earnest and intelligent minds.

132. Some umpires have, however, denied that they were under the slightest obligation to furnish the reasons for their actions, relying, as we think, upon the fact that their judgments would have the same authority without reasoning, and that no power existed to compel the detailing of the "motifs" actuating them. Such was the case with Baron Roenne, named as the umpire of the Mexican Claims Commission under the treaty of 1839. When, as appears from

Moore, 1238, Mr. Webster, as Secretary of State, wrote to Mr. Wheaton; then Minister of the United States at Berlin, that it was understood that Baron Roenne made in each case decided by him a report to his government of the facts and principles on which his conclusions were reached, Mr. Wheaton was instructed to signify to the Prussian Minister for Foreign Affairs the wish of the United States to possess confidentially copies of the reports; the Minister for Foreign Affairs, Baron Von Buelow, declined to give them, on the ground (1) that the general principles involved in the case had formed the subject of correspondence between the Prussian Minister for Foreign Affairs and Baron Roenne, and (2) that the reports should not be communicated to the United States without the consent of Mexico. The refusal of the Prussian government in 1843 to make public the reports of Baron Roenne, in other words the reasons upon which he acted, was adhered to steadily, a like refusal being noted (Moore, 1240) as late as 1897.

**133.** In the Derbec case a majority of the commission (Boutwell's Report, 116; Moore, 3030), upon replying to an application made by the counsel for the French government to the commission "to state the grounds of the disallowance of the claims," said :

International commissions do not usually give the reasons for their decisions, except when the decision stands upon some principle of law which they think ought to be made known. Most of the cases submitted involve only questions of fact, in which the commissioners weigh the evidence, consider the circumstances, the credibility of witnesses, and so decide upon the claim. We reserve to ourselves in the most ample manner the right exercised by all international commissions of deciding for ourselves whether to give reasons or not for our decisions, and in the exercise of the right shall regard what is due to the governments, the claimants, and to the proper dispatch of the business of the commission.

The majority of the commission, having so stated, proceeded further, giving the reasons for the decision in the particular case.

**134.** It is true that, where a mere question of fact is involved, considerations of economy of time, as well as of relative unimportance of the case, will excuse the want of reasoning; but otherwise silence as to the considerations controlling the commission is inadvisable, and constitutes a practice not to be commended.

**135.** In the Cerruti case (Foreign Relations of 1898, 245), President Cleveland, as arbitrator, failed to state in any manner the reasons actuating his conclusions, and for this, as well as for other causes, the decision has been severely animadverted upon by law writers.

136. The Hague Convention for the Pacific Settlement of International Disputes, of 1907, provides, in Article 79, that "the award must give the reasons on which it is based."

#### NECESSITY OF UNANIMITY IN DECISIONS

137. At a meeting of the commissioners under the fifth article of the Jay Treaty to determine the St. Croix boundary, the question arose as to whether the concurrence of all the commissioners was necessary to a decision, the effect of the determination relating thereto being practically to recognize the power of the majority to speak for the commission (Moore, 10).

138. Mr. Kellogg, the American commissioner in the case of the Halifax Commission as to the Fisheries Claims with Great Britain, sitting in the year 1877, declined to sign the award of the majority against the United States (Moore, 746), and deemed it "his duty to state further that it is questionable whether it is competent for the board to make an award under the treaty, except with the unanimous consent of its members." The American agent reserved his right to oppose the award as valid. Mr. Evarts, Secretary of State, discussed the failure of the three commissioners to agree in the result, and the consequent promulgation of the conclusion arrived at by the majority (Moore, 750), arguing, among other things, that by the Treaty of Washington four boards of arbitration were constituted for the determination of different matters. In respect of three of them it was expressly provided that a majority should be sufficient for an award. In the case of the Halifax Commission there was no such provision, and the inference arising from this fact was, he contended, that it was not intended to invest a majority of that commission with power to make an award. While submitting the argument, Mr. Evarts did not undertake to press the interpretation of the treaty made by his government on this point against the deliberate interpretation of the British government to the contrary.

In his answer, Lord Salisbury cited Halleck, Bluntschli, and Calvo to the effect that a decision of the majority of the arbitrators bound the minority, unless the contrary was expressed, and declared that he was not aware of any authorities on international arbitration who could be quoted in the contrary sense.

The award of the majority was carried out, vindicating the good faith of treaties and security and value of arbitration.

## STARE DECISIS

139. The principle of *stare decisis*, recognized as of importance at common law, has never received the sanction of international tribunals, although doubtless particular umpires or commissions have sought, at least in the interest of regularity, to preserve as far as possible uniformity of decision. We cite some illustrations.

In the cases of Clark and Danel (Moore, 2733), Hassaurek said :

The decision of a mixed commission like our own, in an identical case, is certainly entitled to great respect, but it cannot be considered as an authority which we are necessarily bound to follow ; and if, upon a careful examination of the law and the facts, it should appear to us that the decision was erroneous, we are bound by our own conscience and the oath we have taken as members of this commission, to follow our own convictions of right and justice, however sorry we may be to dissent from the opinion of gentlemen for whose ability, conscientiousness, and integrity we entertain the highest regard.

In this case Mr. Hassaurek declined to follow the decision of the umpire of the United States and New Granada Mixed Commission (Moore, 1573), saying :

Sworn to do impartial justice, I could not possibly allow myself to be guided by his opinion. My decision, on which I am willing to stake my reputation as an honest man and a lawyer, will be denounced by the numerous parties interested in those cases, but I am confident that it will be approved by you.

Later the decision of Mr. Hassaurek (Moore, 1573) was followed by Sir Frederick Bruce, and also by the commission between the United States and Venezuela under the treaty of 1885, which unanimously concurred in rejecting the claims of the nature to which he referred.

140. In the Spanish-American Commission (Moore, 3764), although Bartholdi, umpire, allowed claims for such damages as "embargoed property always suffers," the subsequent umpire, Lewenhaupt, in the Compton case (Moore, 3780), refused to allow them, saying that there was no evidence in the case that the injuries for which indemnity was asked "were caused by any specific act of the Spanish authorities." They were only such as were "the result of use, accident and the like," and no indemnity, he said, could be allowed on that account. The decisions, the principle of which he refused to allow, were those in the cases of Angarica and Delgado (Moore, 3780).

The same umpire further held, in the Compton case, *supra* (Moore, 2189), that, as by the third article of the agreement he was "bound to impartially hear and determine to the best of his judgment, according

to public law and the treaties in force between the two countries and these present stipulations," and as there was no stipulation that the umpire was bound by the decisions of the previous umpires, he was not so bound.

**141.** A similar difference of opinion existed between successive umpires of the Mexican-American Commission under the treaty of 1868. Sir Edward Thornton, in the *Rose* case (Moore, 3421), said :

He cannot see that there is any force in the argument that his predecessor has given different decisions upon such questions. He regrets that it should be so, but if these matters are to be settled entirely by such precedents the umpire does not understand why, where there has been a decision upon the matter by a previous umpire, the question should be referred to the present umpire at all. It can only be with the intention that he should express his unbiased opinion upon the matter.

**142.** It is also to be noted that umpire Netto, in the British-Chilean Arbitration (Moore, 4929), held that the bombardment of an open port without fortifications, artillery, or serious means of defense, might afford a cause for action, but that this decision was apparently not followed by his successor.

**143.** If a commission, therefore, is not bound by its own precedents, it naturally follows that neither is it bound by the decisions of the courts of the respective nations, whatever may be their value as foundations of the law. Thus Little, speaking for the commission (United States and Venezuelan Claims Commission of 1889, 17), said : "While the decisions of the highest court of either country are not binding upon the commission as precedents, they are entitled at its hands to great respect as authority. Concurring decisions would, of course, be followed."

**144.** An unusual condition existed in the case of *Danford, Knowlton & Co.* (Moore, 3150), in which, the American arbitrator having held that there was jurisdiction, whereas in what was considered an identical case, that of *King & Co.* (Moore, 3149), he had declined jurisdiction, Baron Blanc held that as the arbitrator of the United States had failed to show how the case was "taken out of the purview of the said joint decision"; and as the conclusions of the arbitrator for the United States in No. 33 could not be "accepted either in whole or in part without directly impugning the joint judgment of the arbitrators in case No. 97," which judgment the umpire "was not allowed to ignore nor called upon to review," this judgment must be considered as covering case No. 33.

## AWARDS

145. We have elsewhere referred to the effect of arbitral awards as *res judicata*, but their force otherwise will now be considered.

146. In general discussion indulged in by the United States and Venezuela Claims Commission of 1889, Little, speaking for the commission (Report, 11), took occasion to say as to an international award :

It is what is behind it that bestows legal energy, namely: The adjudication of a competent tribunal supported by the plighted faith of the states concerned. The full force of such an award may be said to equal the credit which reasonably attaches to an adjustment of submitted differences between disputants reached through the care, candor, and intelligence exercised in that behalf, plus the legal effects such an adjudication imparts thereto. This addition, the seal of the public law upon the adjustment, gives the award or sentence, while undisturbed, its quality of verity. It is the source of all inhering presumptions, and, of course, pertains to all awards alike — to the negative as well as to the positive — i.e., to those rejecting as well as those allowing claims.

He quoted Secretary of State Bayard (Foreign Relations of 1887, 608) as saying :

No matter how solemn and how authoritative may be a judgment, it is subject to be set aside by the consent of the parties. To the awards of international commissions, . . . this position applies with peculiar force, since, as is elsewhere noticed in this report, it is a settled principle of international law that no sovereignty can in honor press an unjust or mistaken award even though made by a judicial international tribunal invested with the power of swearing witnesses and receiving or rejecting testimony.

147. In the Fabiani case, French-Venezuelan Claims Commission of 1902 (Ralston's Report, 81, 140), Plumley, umpire, after referring to the awards under the convention between the United States and Mexico of 1839, said :

After the termination of the commission attorneys for claimants whose demands had been rejected asked that the convention and all the proceedings under it be declared null and void, while the attorneys for the more fortunate claimants strongly objected to such a course. The government of the United States determined to treat as final and conclusive the decisions that had already been rendered and to enter into negotiations for the adjustment of the unfinished business.

148. Mr. Stewart, American commissioner of the Spanish Commission, the Spanish commissioner concurring (Moore, 2187), cited and followed the case of Burchell *vs.* Marsh (17 Howard (United States), 344), to the effect that "if an award is within the submission and contains the honest decision of the arbitrators, after a full and fair hearing, a court of equity will not set it aside for error in law or fact."



149. Nevertheless the United States, upon a number of occasions, has seen fit to consent to the reopening of awards believed unjust. This was the case with the Venezuelan Claims Commission of 1866, whose awards were reopened and reviewed by the commission of 1889, upon which sat two Americans and one Venezuelan. Awards under the Mexican treaty of 1848 were set aside by the courts in the case of the Gardiner claim (Moore, 1255), and were reviewed through act of Congress referring the Atocha claim to the Court of Claims (13 Statutes, 595; 16 Statutes, 633; 8 Court of Claims Reps., 427). In the interest of rejected claims, Congress reopened two of the awards of the commission under the Chinese Claims Treaty of 1858 (15 Statutes, 440; 20 Statutes, 171), permitting the Attorney-General to decide one case finally and the Court of Claims the other. In the case of the *Caroline* the Secretary of State, against the protest of the claimant, returned to Brazil money which had been paid after a diplomatic settlement, and Congress appropriated a large sum to reimburse Brazil for moneys paid the United States representative, but which never reached the Treasury (18 Statutes, 70). So also the Weil and La Abra claims, passed upon favorably by the Mexican Commission under the treaty of 1868, were set aside under acts of Congress (Weil, 27 Statutes, 410; La Abra, 27 Statutes, 409) conferring reviewing authority upon the Court of Claims; its action (Weil, 35 Court of Claims Reps., 42; La Abra, 32 Court of Claims Reps., 473), adverse to the claimants, having been confirmed (Weil, 182 U. S., 45 L. Ed., 1256; La Abra, 175 U. S., 423) by the Supreme Court of the United States. So also the United States, considering the awards essentially unjust, declined to press the Lazare and Pelletier claims (Moore, 1805).

150. A claim submitted to an arbitrator, the principle governing which is decided adversely to the claimant, is to be considered as rejected, and it was so held in the Fabiani case, French-Venezuelan Claims Commission under the protocol of 1902 (Ralston's Report, 81, 127), the umpire saying:

When in the course of his decision the honorable arbitrator of Berne sets aside a claim of Fabiani or eliminates it, it is because in principle and in law the arbitrator has first disallowed it and adjudged against it, through his sovereign power to decide the basic question submitted to him and over which the contest has been made. When he decides this basic question he settles the fate of and effectually determines a large part of the claims of Fabiani. He did not extract them from the case; he did not subtract them; he decided against them and disposed of them adversely, not in detail, but as not being claims for which, in principle, Venezuela was responsible under the terms of the protocol.

151. In several cases before Plumley, umpire of the French-Venezuelan Commission under the treaty of 1902 (Ralston's Report, Heirs of Jules Brun, 5, 29; Dominique & Co., 185, 208), it was decided that although the protocol provided that payment should be made in bonds of the diplomatic debt, which were worth in the market about forty cents on the dollar, the umpire could not take into consideration, and augment his judgment proportionately, the fact that the medium in which payment was to be made was worth less than its apparent face value. In the Dominique case the umpire said :

The warrant for such action [an increased award because of the medium of payment] must be found, if found, in the protocol which constitutes this tribunal and defines its duties, its powers and its limitations. . . . The protocol determined the manner and means of payment, and over that matter gave the tribunal no jurisdiction.

In the Brun case Plumley, umpire, said that, aside from the apparent unwisdom and inequity of such a holding, the umpire was satisfied that he was "not competent under the protocol to do other than to ascertain as nearly as he can the actual sum due from the respondent government in each particular case and to award that particular sum." Under the protocol it was "not for him to determine the means or the methods of payment; this is wholly with the treaty-making power of the two governments, and it has been settled by the protocol in accordance with their high judgment."

Again, in the Decauville Co. case (Ralston's Report, 456; Ven. Arb. of 1903, 499) the Venezuelan commissioner (the French commissioner accepting the result) said that such an arbitrary proceeding (as there asked) "would cause the continued depreciation of the value of the debt until it destroyed it completely, and the holders of it would be the first to suffer the consequences of the values established against the economic rules which govern public securities."

152. We see elsewhere that recommendations made by an umpire or a commission have been ignored; this happened particularly in the case of Lieber, umpire of the Mexican-American Commission of 1868 (Lespes case, Moore, 1302). We have to add that in the matter of the Northeastern Boundary (Moore, 137), where the United States considered that the award of the King of the Netherlands exceeded his jurisdiction, in that he recommended the establishment of a line not claimed by either of the parties and therefore not within the special jurisdiction given him by the protocol, the United States ignored it, and the British government, while perceiving that the

award was recommendatory rather than decisive, expressed its acquiescence in it, but authorized its minister privately to intimate to the United States that it would not consider the formal acceptance of the award by the two governments as precluding modifications of line by mutual exchange and concession, and the matter was made the subject of later adjustment (Moore, 151).

153. Nevertheless, in the arbitral sentence given by Victor Emanuel in the boundary dispute between British Guiana and Brazil (*Revue Générale de Droit International Public*, 1904, Vol. XI, Doc. 18), the arbitrator found that there was not sufficient evidence to decide the controversy over certain parts of the territory in litigation, and accepted as a rule of necessity that he should make the division, taking account of lines traced by nature and giving preference to the line which, being most defined throughout its entire course, afforded the best equitable partition of the territory in dispute.

154. Again, the report to the King of England, in the case of the Chilean-Argentine Boundary Arbitration, expressed itself as being limited in certain particulars to giving advice and indicating how the limits should be determined, adding that, in the opinion of the signers, there was necessity to proceed to the ground itself in the presence of officers named for that purpose by the arbitrators; and this idea, followed by the King, was considered as exactly described by the word "recommendation." (*Revue Générale de Droit International Public*, 1903, Vol. X, 677.)

155. Before the commissions sitting in Caracas in 1903, nations dissatisfied with the findings of the umpires, particularly with relation to the nonresponsibility of Venezuela for the acts of unsuccessful revolutionists, as well as in other cases, filed among the records "reservations" against their full acceptance, and this action passed without comment. However, in the decision of the arbitrators with reference to the boundary between Austria and Hungary (*Revue de Droit International*, second series, 1906, Vol. VIII, 212), it was held that the representative of Austria was wrong in making a reservation.

[He] had not even the right to make it, because his authority related only to the solution of the litigation for the territory in question. But, this consideration apart, the tribunal ought not to admit the reservation as being injurious to its prestige and to the authority of *res judicata* by way of arbitration. Besides, the *dispositif* of the *compromis* required that the determination of the frontier in the manner designated by the pleadings of the two governments should be definitive and not provisory or temporary. It was a matter then of terminating finally the differences without any reservation for an ulterior discussion. The reservation of Professor Balzer is then in contradiction with the purpose of the *compromis* and for that reason inadmissible.

156. An award is not annulled because of the death of the original claimant without known heirs, or without knowledge that the latter, if any there were, were citizens of the United States, as was held by the umpire of the Mexican-American Commission under the treaty of 1869 (Moore, 1354), the umpire saying :

To comply with the request would be an unjustifiable proceeding on his part, because it may well be that there exist heirs of the above-mentioned persons who are citizens of the United States, and who, knowing that the claims have been presented and decided upon, are merely waiting for the time when the payment of the awards shall commence.

#### COSTS AND LEGAL EXPENSES

157. Costs and legal expenses have been both allowed and refused. For instance, in the *Orinoco Steamship Co.* case (Ven. Arb. of 1903, 97; Morris's Report, 266), the greater part of the items of the claim being disallowed, counsel fees and expenses incurred in its prosecution were refused. In the *Bischoff* case (Ven. Arb. of 1903, 581), referring to the *Valentiner* case (Ibid., 562), extrajudicial and other legal costs were refused on the ground that there was "no power in the commission to allow the costs of proving the claim," although in the *Richter* case (Ven. Arb. of 1903, 575) costs were allowed for taking certain additional testimony because the commission itself had directed the claimant to take it. In the *Feuilletan* case (Ven. Arb. of 1903, 406) expenses were expressly disallowed. In the case of *Orr & Laubenheimer* (Foreign Relations of 1900, 832), between the United States and Nicaragua, attorneys' fees were refused.

In the *Bronner* case (Moore, 3135), Thornton, umpire, refused costs because, "although . . . there was no intention on the part of the claimant to defraud the revenue, the first invoices were not sufficiently explicit, and thence arose the legal proceeding, for which it would not therefore be equitable now to make the Mexican government responsible." In the case of the *Masonic* (Moore, 1069), attorneys' fees were refused beyond an amount offered by the Spanish government, no proof being adduced.

158. In a number of cases, however, costs have been allowed; for instance, the umpire under the Mexican-American Commission of 1839 allowed costs incurred in the presentation of the claim as well as for translation. (See, for instance, *Perry* case (Moore, 4347), *Potter* case (Moore, 4227.) The same commission in the case of the ship *Louisa* (Moore, 4325) allowed expenses incurred for endeavors on the part of the claimants in Mexico to obtain payment of what was due

them. In the case of the brig *Nahum Stetson* (Moore, 3131) the commissioners of the Mexican-American Commission of 1868 allowed costs of printing. Costs of translation were allowed by the Mexican Commission of 1839, in the Mitchell case (Moore, 4228). So in the Asphalt Co. case (Ven. Arb. of 1903, 331), costs of translations made for the use of the commission were allowed, and other costs refused. An award of \$60,000 was made for attorneys' fees in the Salvador case (Foreign Relations of 1902, 872), and for costs in addition, incurred either before the commission or in endeavors to secure redress. The protocol in this case provided that the "tribunal might pass upon the right of claimant to recover costs and attorneys' fees."

In the Cheek case (Moore, 5068) the costs of recovery, estimated at three per cent, were allowed. In the *Costa Rica Packet* case (Moore, 4952), expenses to the amount of two hundred and fifty pounds sterling were included in the award. In the May case (Moore's International Law Digest, Vol. VII, 730) an indemnity was granted for expenses, the amount, however, not being separated from other items of the award. In the Baldwin case (Moore, 3240), expenses for the prosecution of the claim were allowed by the Mexican-American Commission of 1839.

159. In the Pacifico case, although the claim failed, the arbitrators settling it between Great Britain and Greece (*Recueil des Arbitrages Internationaux*, 594) awarded one hundred and fifty pounds to be paid by Greece upon the consideration that "some documents of little importance might have been destroyed at the time of the sacking of the house of Mr. Pacifico at Athens, and the expenses that he has undergone in the course of this examination." An award so phrased can hardly be considered, however, an authoritative precedent.

160. In several of the commissions to which the United States have been parties, by treaty or otherwise the costs have been, to the extent of not exceeding five per cent, divided among the various claimants and made a charge upon the total of the awards; in others, and in fact in the majority, the general costs of the commission have been paid by the United States. In the case of the Pious Fund before the Hague Permanent Court an appropriation was made by Congress for the claimant government's portion of the expenses (32 Statutes, 552), to be reimbursed out of the award, should there be one, and such expenses were accordingly repaid to the United States upon the payment of the judgment by Mexico.

The Franco-Chilean Arbitral Tribunal, by its opinion (page 338), declared that, the costs of the arbitration having been made in the

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common interest of the creditors who had succeeded, they should be considered as a charge incumbent upon their recovery, and each one of the successful claimants should be called upon to support them proportionately to the part obtained by it in the distribution.

### DISMISSAL WITHOUT PREJUDICE

**161.** The practice of dismissing a claim without prejudice when the commission finds itself without jurisdiction has been recognized in many commissions. We refer to a few cases.

In the Cobham case (Ven. Arb. of 1903, 409) a claim was directed to be so dismissed, the proof being insufficient, and the cause having been badly handled. Subsequently, however, with the advice and consent of the commissioners, an award was made. In the Stevenson case (Ven. Arb. of 1903, 438), certain of the claimants being found to be Venezuelan and not entitled to be heard as British subjects, their claims were dismissed without prejudice to their rights as Venezuelans before any proper tribunal. In the Burelli case (Ven. Arb. of 1903, 655), the claimant having been unable to present his claim within the time limit, because of default on the part of telegraphic officials of Venezuela, the claim was dismissed without prejudice, leaving the case open for such other remedies, either diplomatic or judicial, as the claimant might elect. In the De Zeo case (Ven. Arb. of 1903, 693), the evidence being insufficient, but the possibility of a rightful demand existing, the claim was dismissed without prejudice to the claimant's right to present his claim in the Venezuelan courts or elsewhere against persons guilty of any legal wrong so far as he was concerned. The Miliani case (Ven. Arb. of 1903, 754) was dismissed upon the question of citizenship, without prejudice to such rights as the claimants might have elsewhere. Certain claimants interested in the Giacomini case (Ven. Arb. of 1903, 765) were dismissed from the commission as Venezuelans, but without prejudice. A part of the Baasch and Römer case (Ven. Arb. of 1903, 906) was dismissed without prejudice, having been presented by stockholders whose only interest was in a Venezuelan corporation.

### INTEREST

**162.** The question of the allowance of interest has arisen before almost every international tribunal, and usually, and save where the claim was for a tort purely, its allowance has been considered rightful, differences more frequently arising as to the time of its commencement

or termination and the rate at which it should be allowed. Commissions allowing interest have included the Geneva Tribunal (Moore, 658); the arbitration in the case of the *Canada* (Moore, 1747); *Costa Rica Packet* case (Moore, 4954); the arbitration in the case of the American Whaling Claims against Russia (Foreign Relations of 1902, Appendix I, 453, 458, 463, and 466); the case of the *Macedonian* (Moore, 1466); The British-American Claims Commission (Hale's Report, particularly page 21); United States and Great Britain Claims Commission of 1853 (304, 333, and 435); Spanish-American Commission (Moore, 3763); United States and Mexican Claims Commission of 1839 (Moore, 4228 and 4325); the Ecuadorian Claims Commission (Moore, 1576); and all commissions sitting in Caracas in 1903. The rates allowed by them, however, materially differ, as, for instance: At the rate of three per cent, such being the legal rate fixed in Venezuela, before the American, British, German, and Italian commissions. At the rate of five per cent: the *Costa Rica Packet* case; by the umpire of the Swedish-Venezuelan Claims Commission (Ven. Arb. of 1903, 949); by the United States and Mexican Commission of 1839 (Moore, 4228); by the Ecuadorian Claims Commission (Moore, 1576). At six per cent: claims arising out of the Panama Riot (Moore, 1381) (but five per cent on all other claims before the same Colombian Commission); the American Whaling Claims against Russia; the claims before the British-American Claims Commission of 1871; by the Mexican-Venezuelan umpire (Ven. Arb. of 1903, 880); the Spanish Spoliation Commission (Moore, 1005); the *Macedonian* case (Moore, 1466); the Spanish-American Commission (Moore, 3764); the Mexican Commission of 1839 (six per cent being the legal rate in Florida and considered applicable in the Green case (Moore, 4325), but in other cases five per cent); and eight per cent, by the umpire of the Spanish-American Claims Commission (Moore, 3763), in the case of seizure of property in violation of treaty stipulations.

163. Departing from the rule adopted by a number of other Venezuelan commissions, the umpire of the Swedish-Venezuelan Commission in the *Christina* case (Ven. Arb. of 1903, 949) rejected the rate of three per cent as applicable, on the ground that it could only be equitably invoked "by virtue of specific stipulations or in case of loans of money under absolute security, and not where there is question of industrial or commercial undertakings in which this requisite is necessarily lacking"; and he allowed five per cent, which he said was "the rate that Venezuela pays commercial companies on her external debt," although in the Cervetti case (Ven. Arb. of 1903,

658) the umpire of the Italian Commission had referred to the fact that "the rate upon bonds given by Venezuela in payment of awards in favor of French citizens and English and Spanish subjects" was three per cent.

In the Del Rio case (Ven. Arb. of 1903, 880) the umpire of the Mexican-Venezuelan Commission allowed interest at the rate of six per cent, such being the legal rate of Venezuela at the time when the obligation was incurred, and being the rate at that time paid by the government upon loans.

164. On the other hand certain commissions have refused interest, either generally or under special circumstances; as, for instance, the umpire of the Spanish-American Commission (Moore, 2185), in a case where the claimants, before they brought the claim before the commission, refused to accept a decree of the Captain General of Cuba ordering a payment to them of the amount found by the commission justly to be due to them, and they having been guilty of delay in the prosecution of their claim far in excess of what was a reasonable period for closing claims before the commission. The same umpire in the case of Young, Smith & Company (Moore, 4327) refused interest because of a very long, unexplained delay in the presentation of the claim. Upham, commissioner, speaking for the commission in the United States and Great Britain Claims Commission of 1853, in the Wirgman case (Report, 313), refused interest, holding that the duties were originally paid without complaint, and that the claim had been permitted to slumber until a short time previous without being brought to the notice of the United States, although in the Godfrey, Pattison & Co. case (Report, 304) the same commissioner, speaking for the commission, there having been protest from the beginning, and the violation of law being obvious to the defendant government, allowed interest.

So in the American Electric and Manufacturing Company case (Ven. Arb. of 1903, 36; Morris's Report, 131), interest was refused because a claim had never been officially presented to the Venezuelan government. The basic grounds of such action will be discussed later.

As we have stated, interest is generally refused for damages, for, as was stated in the Christern & Company case (Ven. Arb. of 1903, 520): "Damages in such cases are necessarily unliquidated and their exact amount cannot be precisely ascertained. In such cases as between individuals, interest is not usually allowed."

Interest will be refused on costs, as was held in the Ship *Louisa* case before the Mexican Commission of 1839 (Moore, 4325).



165. In the *Montijo* case (Moore, 1445) the umpire decided against the payment of interest for the following reasons:

First: Because there is no settled rule as to the payment of interest on claims on countries or governments. Secondly: Because it seems open to question whether interest should accrue during the progress of diplomatic negotiations which are often protracted in their character. Thirdly: That this reason applies with special force to negotiations which result in arbitration or a friendly arrangement. Fourthly: That whilst doing what he considers strict justice to the claimants by giving to them the full value of the use of their vessel during her detention, he desires to avoid any appearance of punishing the Colombian people at large for an act with which very few of them had anything to do, and which affected no Colombian interests beyond those of a few speculators in revolutions in Panama.

166. Commissions have refused to compound interest. In the *Idler* case (United States and Venezuela Claims Commission, 139, 194) it was said:

We have carefully considered the arguments in favor of computing interest up to the date of the former award and then allowing interest on the amount from such date. There is much force in the views presented where former awards are refund. But we feel that course may not be warranted by the interest provision of the treaty, which reads, "and in the event of interest being allowed for any cause and embraced in such award, the rate thereof and the period for which it is to be computed shall be fixed, which period shall not extend beyond the close of the commission."

So in the *Christern & Company* case (Ven. Arb. of 1903, 584) the umpire could not "find any warrant or authority in the proofs for compounding interest."

167. An unusual question with regard to interest arose in the case of *Godfrey, Pattison & Co.* (hereinbefore mentioned on page 84), before the United States and British Claims Commission of 1853 (Report, 304), Upham, commissioner, speaking for the commission, saying:

A question of payment of interest has also been raised. It appears that at the time the duties were demanded the claimants formally protested to the collectors of New York and Boston against the rate of duty assessed, as contrary to treaty stipulation. They also claimed protection from Mr. Fox, her Majesty's minister at Washington. The United States was, therefore, from the first informed that the payment of the duty would be resisted. The act itself, also, of the thirtieth of August, 1842, should have placed them on their guard, as it expressly provides "that nothing contained in it shall be construed or permitted to operate so as to interfere with subsisting treaties with foreign countries." Under these circumstances, we are of opinion interest should be allowed on the claim from the time of payment.

This case presents a very direct application of the principle of charging interest from the time a government is put upon notice of the existence of the claim.

168. In the first case upon the subject receiving consideration before the Caracas commissions, that of Cervetti (Ven. Arb. of 1903, 658), it was said :

According to the general rule of the civil law interest does not commence to run, except by virtue of an express contract, until by suitable action (notice) brought home to the defendant he has been "*mis en demeure*." Approximately the same practice exists in appropriate cases in some jurisdictions controlled by the laws of England and the United States. If such be the rule in the case of individuals, for stronger reasons a like rule should obtain with relation to the claims against governments. For, in the absence of conventional relations suitably evidenced, governments may not be presumed to know until a proper demand be made upon them, of the existence of claims which may have been created without the authorization of the central power and even against its express instructions. . . . It has seemed fairer to make a certain allowance for interest, beginning its running, usually, at any rate, from the time of the presentation of the claim by the royal Italian legation to the Venezuelan government or to this commission, whichever may be first, not excluding, however, the idea that circumstances may exist in particular cases justifying the granting of interest from the time of presentation by the claimant to the Venezuelan government. This method of procedure will, in the opinion of the umpire, offer in international affairs the degree of justice presented by the "*mis en demeure*" as to disputes between individuals.

The exact rule adopted by the umpire, recognizing the rightfulness of interest from the date of the making of a diplomatic claim, was followed in the case of the *Macedonian* by the King of the Belgians (Moore, 1466).

A like rule as to the allowance of interest from the date of demand in contract cases was followed in the American (de Garmendia case, Ven. Arb. of 1903, 10 ; Morris's Report, 64), British (Motion for Interest Opinion, Ven. Arb. of 1903, 413), German (Christern & Company case, Ven. Arb. of 1903, 520), and Netherlands (Henriquez case, Ven. Arb. of 1903, 896) commissions, sitting at Caracas, under all of which the rate, in the absence of special contract, was fixed at three per cent, this being the rate established by Venezuelan law in the absence of express contract covering the matter.

169. The commissions last named united in allowing interest where otherwise permissible to the date of the estimated conclusion of their labors, and in so doing they found precedent in the action of the Ecuadorian Commission (Moore, 1576), and of the British-American Commission of 1871 (Hale's Report, 21).

**170.** All of these commissions refusing to allow interest on awards did so on grounds largely set forth in the Motion for Interest Opinion (Ven. Arb. of 1903, 413), in which the umpire took the view that there was nothing in the protocol expressly providing for interest on awards, and that in the absence of such authority the commission had no power to allow the interest to run for a time beyond its own life. In this particular respect he was supported by the precedent of the Mitchell case before the United States and Mexican Commission of 1839 (Moore, 4228 ; see also Moore, 1317), and by the fact that the Geneva Tribunal granted no interest upon its award.

**171.** At variance with the commissions referred to, the Spanish Spoliation Commission (Moore, 1005) allowed interest upon the award until its discharge, differing in this particular from perhaps all subsequent similar bodies.

**172.** The French-Venezuelan Commission found it necessary to say, in the Daniel case (Ven. Arb. of 1903, 507), that a double indemnity for interest and damages could not be allowed.

In the case of the Belgian Postal Claim against Venezuela (Ven. Arb. of 1903, 270) the umpire refused all interest, demand therefor not having been presented in the claim itself.

## CHAPTER IV

### PARTIES

173. The party to a claim before an international tribunal must of necessity be the real person in interest, or, as expressed in Moore, 1353, "the person who [has] the right to the award." The government sues for his benefit, and the claim is subject to all of the principal defenses which might properly lie against him in any other tribunal. Nevertheless, many interesting questions have arisen as to who was the person entitled to the award, and whether sufficient legal right existed in the claimant for his recognition before an international tribunal. We discuss under other headings the fundamental attributes of a claimant, the prime one being citizenship in the claimant nation, and we also consider the necessity of the preservation of such nationality in the claim itself, from its inception to the date of its presentation before a commission. We will now consider the rights of particular classes of claimants before the commission with reference to their legal relation to the subject matter.

### PARTNERS

174. Questions of partnership have repeatedly arisen, and often claims have been allowed to be presented by a partner for his undivided interest in the subject matter of his claim when his associates in the partnership were so situated, because of citizenship or otherwise, as not to have a standing before the commission.

In the Finn case, before the United States and Venezuelan Claims Commission of 1889 (Report, 94), it is said :

In the treaty of 1803, between the United States and France, for the adjustment of claims, is this provision : "It is the express intention of the contracting parties not to extend the benefits of the present convention to reclamations of American citizens who shall have established houses of commerce in France, England, or other countries than the United States, in partnership with foreigners, and who by that reason and the nature of their commerce ought to be regarded as domiciliated in the places where such houses exist." This provision, perhaps, simply embodies the international law on this subject. If Finn was in partnership with Soto, it is believed the business took its character from the place, and was

Venezuelan. As to the partnership business, was he not domiciliated in Venezuela and a Venezuelan? . . . Even if the evidence was to the effect that he was partner with respect to this property, we should want to know to what extent he was partner — whether he owned the half, the fourth, the tenth or what proportion. A partner's interest as between the partners depends upon the state of their accounts on settlement.

Other commissions have confined themselves to determining simply the respective interests of the partners, without as a rule laying stress upon the matter of domicile (save at least so far as it is affected by local laws, recognizing a partnership, like a corporation, as being a legal entity, — a matter hereafter to be discussed).

175. In the Peruvian Claims Commission (Moore, 1654) the umpire held that "if it may be said that business firms have a nationality, such nationality is that of the country in whose territory they reside, under whose laws they have been formed, and by which they are governed." "The umpire held that the case," continues Moore, summarizing the decision, "might indeed be different in regard to a company under a national charter, but the mere assumption of a name could not give a firm nationality." The umpire therefore decided that only the claimant's (Ruden's) individual interest in the firm was directly before the commission.

176. In the Massardo, Carbone & Co. case (Ven. Arb. of 1903, 706) the umpire found that the evidence did not disclose how "many members of the firm there were, or what were the interests of each. Neither does it appear that the widow is the sole heir of Massardo, the former apparent member of the firm. If it is designed to claim the interest of the widow alone, her inheritance from the husband should appear and also the proportionate size of his interest in the firm. If it is designed to claim for the entire partnership, the names of all should be given, together with the appropriate proofs of citizenship, for only Italian subjects may have any interest in any claim passed on by this commission." The lacking proof being furnished, an award for claimant was subsequently given.

Other claims in the condition of having diverse citizenship among the members of the partnership were presented before the Italian-Venezuelan Commission, and awards were given proportionate to the amount of the Italian interest, no suggestion having been made on the part of Venezuela that their domicile in Venezuela had created Venezuelan citizenship in the partnerships.

177. In the Baasch & Römer case, before the Netherlands-Venezuelan Commission (Ven. Arb. of 1903, 906), Plumley, umpire,

allowed recovery proportionate to the interests of the Dutch members of the extinct partnership, and in the Henriquez case he commented upon the lack of just such proof (*Ibid.*, 910).

178. In the case of Jennings, Laughland & Co., Thornton, umpire (Moore, 3135), said that if he "had thought proper to award compensation on account of the claim, it would only have been to Jennings, as a citizen of the United States, the same proportion of the compensation as his share in the business bore to the whole of it."

179. A surviving partner has been recognized as the proper person to prosecute the firm's claim (Garrison, surviving partner, *vs.* Mexico, Lieber, umpire (Moore, 1356); see also Coleman case (Hale's Report, 98), hereinafter cited).

180. In contradistinction to some other cases already mentioned, the fact that there was associated with a citizen of the claimant country, in the ownership of real property, a citizen of the defendant nation, has operated to result in a loss to him for which no recompense was obtainable before an international tribunal. In the Casanova Bros. case, for instance, before the Spanish Commission (Moore, 2337), it was held "that Spain had a right to lay an embargo in that way upon the property of a Spanish subject, and that if loss thereby accrued to other members of the firm, it was a case of *damnum absque injuria*."

In the Homan case (Moore, 3409), before the same commission, one of the two parties in interest appearing before the commission was allowed to receive a moiety of the whole claim; the copartner being held equally entitled, and to have a right thereafter to prefer a claim for his share of the loss.

181. In the second Alabama Claims Court, in the John McStea case (Moore, 2381), the court referred to the case of J. Levois & Co. against the United States (Davis's Report, 109), where a claim was divided on proof that the claimant was not responsible for the disloyal conduct of his partner.

Before the commission under the act of 1849 to decide the claims against Mexico, for which the United States had assumed responsibility, the same questions several times arose. In the Morrison case (Moore, 2327) the commissioners said, "This principle of the law of nations which confers upon the different members of the firm different rights according to their several national characters, has been frequently recognized by judicial decisions in cases of prize," citing Duer, *Principles and Practice of Marine Insurance*, Vol. I, 526. "According to the principle laid down in this authority, it is proper to award

to the American member of the firm an indemnity equal to his share of the property destroyed, while the other member, not being a citizen of the United States, can claim no portion of the indemnity which the United States has procured for its own citizens alone."

#### MARRIED WOMEN

**182.** Elsewhere discussing the subject of citizenship we see that the status of a married woman follows, at least during coverture, that of her husband as to nationality. We may refer to the case of the heirs of Maxan (Moore, 2485), wherein Thornton, umpire, held as follows :

The daughter of Lodoiska, being married to a Spaniard, is not a citizen of the United States, and the commission cannot take cognizance of her part of the claim in accordance with the terms of the convention by which it is limited to the consideration "of all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of the Mexican Republic," etc.

The same umpire held in the Lizardi case (Moore, 2483) that "the nationality of the wife must be that of the husband." (See Sec. 183, *infra*, as to this case.)

**183.** A foreign-born woman, coming into the United States at the age of ten years, residing here and marrying a native-born citizen of this country, was held by Wadsworth, commissioner, in the Chase case (Moore, 2160), as having an American character within the meaning of the treaty, and the commission held that "as this character was acquired before the event complained of it continued till that time until the contrary appears."

This disability is not removed by widowhood and remarriage to a citizen of the claimant nation, the injury complained of occurring under the prior marriage, for, as held by the Mexican Claims Commission in the Lizardi case (Moore, 1353), an American woman who was married in July, 1861, to a British subject in Mexico was held not to be competent to appear before the commission as a claimant in respect of damages done by the Mexican authorities in November, 1861, to the estate of her former husband, although her second husband had, in 1866, become a citizen of the United States by naturalization.

**184.** In determining the status of a married woman, the law of domicil controls (Brignone case, Ven. Arb. of 1903, 710; Mathison case, *Ibid.*, 429). This rule was followed by the British-American Claims Commission (Hale's Report, 17) in the cases of Bowie, Calderwood, and Tooraen, it being held that "the national character of a married

woman is governed by that of her husband in all cases, irrespective of domicil; and that on the death of the husband the national character of the widow acquired by marriage remains unchanged." From this conclusion Commissioner Frazer dissented in the case of a widow of American origin, who had always remained domiciled within the United States, holding that in such case, upon the death of her British husband, the widow resumed her original nationality.

185. In the Brand case before the same commission (Hale's Report, 18), the claimant, a native of Ireland, had been for several years domiciled in New Orleans. She was married in 1838 to a citizen of the United States and continued domiciled in New Orleans. Her memorial alleged that, although married to an American citizen, she never in any manner adopted his nationality; that after his death she uniformly claimed the character of a British subject, and that in August, 1862, before the commission of the acts complained of, or of a part of them, she had made proof of her character as a British subject before the British consul at New Orleans and been duly registered as such. The commission nevertheless dismissed the claim for want of jurisdiction.

186. In the more recent case of Giacopini (Ven. Arb. of 1903, 765) an Italian woman married to a Venezuelan, and by the laws of Venezuela thereby becoming Venezuelan, was held not entitled to appear as an Italian claimant.

In the Stevenson case (Ven. Arb. of 1903, 438) it was held that a woman acquires the nationality of her husband by marriage, but if she continues to reside in the country of her birth after the death of her husband, and the law of such country provides that she is a citizen of her husband's country during her marriage only, then the law of her domicil will control, and she cannot be considered a subject or citizen of the country of her husband.

187. In the Lebre case (Boutwell's Report, 126) the American commissioner held, and the umpire apparently agreed with him, that a married woman became naturalized by the naturalization of her husband.

#### ADMINISTRATORS

188. The question has several times been raised before commissions as to the respective rights of administrators and heirs to appear as parties claimant. It may generally be stated that, where the injury claimed has relation to property rights, the proper person to appear and represent the estate of the decedent is the administrator. The rights of heirs as parties will be discussed hereafter.



In the Wiltz case (Boutwell's Report, 70 ; Moore, 2243) the position of the majority of the commission was regarded by Mr. Boutwell as justifying the conclusion that, in the case of the death of a claimant, it was competent for his legal representative to appear and prosecute the claim, and this without reference to his nationality; the representative being an administrator and the real ownership of the claim resting in the heirs, who were the French descendants of the original claimant.

The same question arose in the cases of Halley, administrator, and Grayson, administrator (Hale's Report, 19 ; Howard's Report, 15 ; Moore, 2241), a majority of the commissioners being of the opinion :

Where the claim is prosecuted by an administrator in respect of injury to property of an intestate who was exclusively a British subject, and the beneficiaries are British subjects as well as American citizens, the claim may be prosecuted for their benefit. The commissioners are all of opinion that the particular nationality of the administrator does not affect the question.

The language of the decision appears somewhat equivocal, referring as it does to beneficiaries "who are British subjects as well as American citizens," interpreted, however, in the Grayson claim, in which "an award was made in favor of the claimant for the one half of the claim to which the distributees were entitled, rejecting the one half belonging to the widow as the claim of an American citizen."

189. The administrator of a deceased surviving partner was allowed to be substituted for the original claimant, who died before the filing of the claim (Coleman case, Hale's Report, 98).

190. In the George E. Underhill case (Ven. Arb. of 1903, 48 ; Morris's Report, 162) we find a claim rejected by Barge, umpire, because of failure on the part of claimant to prove that she was appointed administratrix, and entire absence of proof of the existence of a will.

191. In the Mexican Claims Commission under the treaty of 1848 (Moore, 1271) the commissioners repeatedly decided "that claims originally belonging to parties who had since deceased must be presented by their legal representatives, and not by their heirs. "The board," said the commissioners, "has not the means of deciding questions touching the distribution of intestate estates, which depend upon local laws and involve inquiries as to domicil and many other topics of which we are furnished with no evidence. Besides, it may happen that the rights of creditors are involved, who are entitled to be paid before any distribution can be made."

## HEIRS

192. That the question of the right of heirs in the claim of their ancestor — a subject materially affecting their right of appearance before a commission — must be determined by local laws, was the holding of Upham, commissioner, speaking for the commission, in the Cook case (United States and Great Britain Claims Commission of 1853, 169), he stating :

No instance can be found of the interference of government with the question of ordinary heirship and succession of estates in other jurisdictions. They are left to local action and jurisdiction of the courts of the countries where situated. There is every reason why it should be so.

So the heir cannot take more rights before an international tribunal than were owned by the ancestor, for, as was said by Baron Lederer, umpire, Spanish-American Commission (Moore, 2334) :

Emma Cisneros is the heir of a Spanish subject against whom, if there was a wrong, the wrong was committed. The claim of this Spanish subject had no standing before the American-Spanish Commission, which derives its jurisdiction from the said agreement. Emma Cisneros could not inherit more rights than her father possessed during his lifetime.

193. As has appeared in this discussion under the head "Partners," in the Massardo, Carbone & Co. case (Ven. Arb. of 1903, 706), the widow claiming to be the sole heir of Massardo, it was held that "her inheritance from the husband should appear, and also the proportionate size of his interest in the firm."

194. The question as to who are the heirs — whether the law of the domicile of the decedent or the law of his nationality should rule — received very considerable discussion in the Brignone case (Ven. Arb. of 1903, 710) ; umpire Ralston, applying the law of the domicile to determine the question rather than concerning himself about the law of the status, considered : "Any other view would, in the umpire's opinion, give to the Italian law an extraterritorial effect, overruling the law of the domicile where the goods were situate and the decedent was domiciled." He recognizes, however, the very great difference of views existing upon this point under the laws of different countries.

For an extensive discussion of the question as to which law of distribution should control, we refer to an article by M. Henri Jacques in *Revue de Droit International*, 1886, Vol. XVIII, 563, entitled *La Loi du Domicile et la Loi de la Nationalité en Droit International Privé*.

195. In the Metzger case (Ven. Arb. of 1903, 578), Duffield, umpire, recognized as surviving to the heirs an action for injury to the person (treating injury as creating property in a right of action), basing his decision upon the fact that "under the laws of Venezuela, the right of action for personal injuries does survive and pass to the heirs of the deceased, in so far as damage for corporeal injuries is concerned." He expressly excluded, however, damages to feeling and reputation as not surviving to the heirs.

The claim of the heirs of Cyrus M. Donoughho for personal injury and death was presented before the Mexican-American Claims Commission of 1868, and allowed without objection to the claimants as the true parties in interest (Moore, 3012).

196. In the Cesarino case (Ven. Arb. of 1903, 770) an award for the killing of the father was made in favor of the widow and minor child, and in the Di Caro case (Ven. Arb. of 1903, 769) an award was made in favor of the widow for the wrongful death of her husband, but refused to the sons because of their revolutionary career.

197. In the Brignone case (Ven. Arb. of 1903, 710) an award was made in favor of the Italian heirs of the original claimant for supplies furnished to the Venezuelan government.

198. In none of the cases above referred to, in which an allowance was made in favor of the heirs for property, was it contended that the claim should have been presented by an administrator rather than by the heirs themselves; this perhaps for the reason that the civil law rule as to the representation of estates by administrators or executors is not identical with the common-law rule invoked in England and the United States.

199. In several cases before the British-American Commission (Hale's Report, 61), where it was alleged that the injuries complained of caused or contributed to the death of the intestate, with no allegation of any local statute allowing damages in favor of the personal representative for wrongful injuries causing death, the British counsel contending that such injuries to the person, whether resulting in death or not, were, in the diplomatic intercourse of civilized nations, treated as a proper subject of international reclamation in behalf of the personal representative of the person injured after his death, a majority of the commission overruled the demurrers to the memorials, taking the same position even where all connection between the injury alleged and the death of the intestate were disclaimed by the memorial.

In the McHugh case, however (Hale's Report, 61), where the deceased died unmarried, leaving only collateral relatives not dependent

on him for support, the commission unanimously sustained the demurrer and disallowed the claim.

**200.** An award once made will not be annulled because of the death of the original claimant without known heirs, citizens of the claimant country. This was decided by Sir Edward Thornton (Moore, 1354), he considering that he had no right to annul an award for such reason, and that to comply with a motion for such purpose "would be an unjustifiable proceeding on his part, because it may well be that there exist heirs of the above-mentioned persons who are citizens of the United States and who, knowing that claims have been presented and decided upon, are merely waiting for the time when payment of the awards shall commence."

Of course, where the heir is not of the same nationality as was the original claimant, he will not be recognized as a claimant, as was held in the *Lizardi* case (Moore, 1353).

#### NATIONS AS PARTIES CLAIMANT

**201.** In practically all international tribunals, a notable exception in form though not in essence being that of the Alabama Claims Commission, the nation appears as a party suing not for its own benefit but for the benefit of its citizens, and it is not for the insult to the dignity of the nation that recovery is sought, as we shall see elsewhere, but for the specific injury to each of the citizens represented by the claimant government.

Thus in the case of the *Alleghanian* (Moore, 1624), for guano, property belonging to the government of Peru, and for the value of which the Peruvian government presented a memorial before the Peruvian Claims Commission, the agent of the United States excepted on the ground that, as it was "a claim of the government of Peru, and not of a 'citizen' of that country, it was not embraced in the convention." The commissioners unanimously sustained the exception, and declared the commission incompetent to decide upon the claim, and at the same time directed the *expediente* to be returned to the agent of Peru.

The limitation upon the power of the commission is clearly evolved from the text of treaties referring to the commission specifically the claims of the "citizens" or "subjects" of the claimant nation, as the case may be. Where, however, the word "citizen" or "subject" does not appear, but a more general term is used, the right of the nation to recovery for a specific pecuniary injury to it has, in the absence

of contest, been recognized. Thus, for instance, under the Italian-Venezuelan protocol, which covered "Italian Claims" with certain exceptions, jurisdiction was, without challenge, taken over a claim arising out of the Postal Treaty for an amount specifically due by the Venezuelan government to the Italian government (Ven. Arb. of 1903, 665). In this case, however, the interest allowed was not that given by the commission in other cases, but limited to the terms set forth in the treaty, which, as was said by the umpire, "is a contract determining absolutely the rights of the parties." So also before the Belgian-Venezuelan Commission, where jurisdiction was given over "Belgian Claims," the Venezuelan representative not challenging the interpretation of these words, judgment was given directly in favor of Belgium against Venezuela (Postal Claim, Ven. Arb. of 1903, 270).

#### CORPORATIONS AS CLAIMANTS

**202.** That corporations may be parties to proceedings before international tribunals might seem to go without saying. They are to be treated as any other parties interested in the subject matter of a claim, provided only they possess the requisite nationality. Nevertheless this point was expressly decided, in the case of Robert Stirling, before the Anglo-Chilean Commission of 1894 (*Reclamaciones Presentadas al Tribunal Anglo-Chileno*, Vol. I, 166), the commission holding that "all claims" included claims of corporations as well as of private individuals.

A question has arisen repeatedly, however, as to whether the nationality of the claim is to be determined by the place of the formation of the corporation, or by the nationality of the stockholders, or of a majority of them. A cognate question receiving consideration is as to whether the stockholders as such have a right of recovery apart from the corporation in which they may have invested. The *Delagoa Bay* case (Moore, 1865) has been often referred to as authority to the effect that the nationality of such a claim is governed by the nationality of the stockholder, and therefore that the English and American interests, as stockholders or bondholders under a Portuguese corporation, and a British corporation formed for the purpose of financing it, were entitled to proceed internationally, by virtue of being such stockholders, against the Portuguese government. The particular facts necessary more fully to show the condition of the stockholders and bondholders are contained in an extract from the letter of Mr. Secretary Blaine, dated November 8, 1889 (Moore, 1866), as follows:

On December 14, 1883, Edward MacMurdo, a citizen of the United States, received from the Portuguese government a concession for the construction of a railway from the Port of Lourenço Marques to the frontier between the territory of Portugal and the Transvaal. The line of the railway so to be constructed and its extent were subsequently defined by plans approved by the Portuguese government on October 30, 1884.

In accordance with the provisions of his concession, Colonel MacMurdo at once proceeded to form a company for the construction of the railway, which bore the title of the Lourenço Marques and Transvaal Railway Co., and was organized in Portugal. This company after several extensions of time was unable to procure funds with which to complete the contract, and Colonel MacMurdo then sought to obtain the necessary capital in England. His efforts in that direction resulted in the formation in London of the Delagoa Bay and East African Railway Co., and under the auspices of this organization the funds required for the completion of the railway were secured. In these various transactions Colonel MacMurdo, who remained all through, as the original concessionaire, a responsible party for the completion of the road, took and paid for a large amount of stock and bonds, and his proceedings for the formation of the British company had the approval of the Portuguese government, the only reservation which it made in regard thereto being that the concession should not be transferred to the British company. With this reservation, it was understood on both sides, as appears by the correspondence, that the British company might hold a part or even all the shares of the Portuguese company.

The Portuguese government failing to live up to the terms of the concession, and damaging both the English and American parties interested, an arbitration was had. It does not appear from the terms of the protocol that the question we refer to was expressly raised. The first article authorized the arbitral tribunal to fix the amount of the compensation due to the English and American claimants, and the third article provided that "it shall render its judgment upon *the substance of the cause*, and shall pronounce, as it shall deem most just, upon the amount of the indemnity due by Portugal to the claimants of the other two countries."

The fourth article provided that "although it appertains to the arbitration tribunal to designate the private persons or the moral persons who are entitled to the indemnity, the amount of that indemnity shall be paid by the Portuguese government to the other two governments, in order that they make distribution of it to the claimants."

203. Although it is perfectly apparent from the foregoing, considered more at large in connection with the correspondence, that the question of the respective nationalities of corporations and stockholders was never designed to be considered, and is ignored in the award (Foreign Relations of 1900, 903), nevertheless, in the Salvador Commercial case (Foreign Relations of 1902, 873), where the claimant

was an American corporation, — a stockholder to the extent of the bare majority of shares in the Salvadorean Corporation, — the majority of the commission said :

We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in El Triunfo Co., a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well understood Delagoa Bay Railway arbitration.

**204.** The Franco-Chilean arbitral tribunal found it necessary to consider the citizenship of a corporation and, on page 248 of its decision, said :

In truth La Compagnie Consignataire argues wrongfully that in its capacity of juridical person it has no nationality; that this contention is in contradiction of the principles generally admitted, according to which the legislation of various states distinguishes between indigenous moral persons and foreign moral persons, whose capacity in matters of commerce or procedure is more often regulated — especially in that which affects *sociétés anonymes* — by international treaties; that it is necessary to consider as determining from the point of view of nationality the law under the rule of which the moral person, corporation or *société anonyme* is formed, and on which its capacity depends; that is to say, commonly the law in force at its principal office; that it follows from this that the Compagnie Consignataire is a Peruvian society, since it is ruled by Peruvian law, and its principal office is at Lima; . . . that it matters little from this point of view that a certain number of its stockholders are foreigners to Peru.

**205.** The same question received the consideration of Plumley, umpire of the Netherlands-Venezuelan Commission, in the Baasch & Römer case (Ven. Arb. of 1903, 906). It was sought to recover for claimants' interest as stockholders in a Venezuelan corporation, the property of which had been destroyed and the concern thereby bankrupted. The umpire said :

It is not necessary to consider this claim further than to accede to the position taken by the learned agent of the respondent government. It is a Venezuelan corporation, created and existing under and by virtue of Venezuelan law and has its domicil in Venezuela. This mixed commission has no jurisdiction over the claim. It is the corporation whose property was injured. It may have a rightful claim before Venezuelan courts, but it has no standing here. The shareholders being Dutch does not affect the question. The nationality of the corporation is the sole matter to be considered. This claim is therefore dismissed without prejudice.

**206.** The general subject received consideration in the Kunhardt case, where the American and Venezuelan commissioners each filed opinions differently reasoned, but reaching the same result. Paul,

Venezuelan commissioner, said (Ven. Arb. of 1903, 63; Morris's Report, 202) :

The shareholders of an anonymous corporation are not co-owners of the property of said corporation during its existence; they only have in their possession a certificate which entitles them to participate in the profits and to become owners of proportional parts of the property and values of the corporation when this one makes an adjudication as a consequence of its final dissolution or liquidation. The Venezuelan Commercial Code in Article 133 expressly determines that an anonymous corporation constitutes a juridical person distinctly separated from its shareholders. . . . The integrity of the rights of the corporation remains in the corporation itself, and its exercise is specially and legally intrusted, by the common law, by the provisions of the commercial code, and by the social contract, to the manager and the board of directors. Therefore the said rights cannot be exercised by any other person than the directors of the corporation. . . . The case of the claim of the Salvador Commercial Company and other citizens of the United States, stockholders in the corporation which was created under the laws of Salvador, under the name of El Triunfo Company, Limited, and the other one of the Delagoa Bay Railway Company, to which the attention of the commission has been called by the honorable agent of the United States, have been carefully examined, and they do not present any likeness to the present claim.

Bainbridge, commissioner, held as follows :

The real interest of Kunhardt & Co. is an equitable right to their proportionate share of the corporate property after the creditors of the corporation have been paid. . . . The value of the corporate shares and the extent of a shareholder's interest in the corporate property are absolutely dependent upon the relation which the assets of the corporation bear to its liabilities. The absence of such a showing in this case renders impossible the determination of Kunhardt & Co.'s interest in the concession or the amount of loss they have sustained by its annulment. The claim must, therefore, be here disallowed.

In the Henriquez case (Ven. Arb. of 1903, 910), Plumley, umpire of the Netherlands-Venezuelan Commission, refused to entertain jurisdiction of the claim of a Hollander stockholder in a partnership which it was not disputed was by Venezuelan law a citizen of Venezuela.

207. In the case of Robert Stirling, before the Anglo-Chilean Commission (*Reclamaciones Presentadas al Tribunal Anglo-Chileno*, Vol. I, 158), it was held that the act creating an anonymous society, approved and recognized by the authority of the country where it was created, should be examined carefully to determine if such society be national or foreign; that the nationality of an anonymous society is to be determined by the domicil of this juridical person, by the place of residence of the society, and that the seat of the administration and direction fixes this domicil, and not the center of exploitation; that it may be said that moral persons are possessed of the nationality of the state or lawgiver granting them existence.



**208.** In the Cerruti case, President Cleveland (Foreign Relations of 1898, 245) made an award in favor of the partnership (a corporation by Colombian law) in which Cerruti was the principal party interested. Pierantoni (*Revue de Droit International*, 1898, Vol. XXX, 460), although an Italian, severely criticised the award for this reason, saying :

A commercial society cannot be considered as a foreigner for the sole reason that one of the associates is a foreigner. A great number of documents prove, outside of the text of the protocol, that the two governments, the Italian and the Colombian, persisted in separating the society from the claimant Cerruti. It is not then doubtful that the decision upon this point traveled completely outside the limits of arbitral action. The losses and damages of Cerruti are not the losses and damages of the society of which Cerruti made part.

**209.** Notwithstanding the language quoted from commissions, it may be considered that the main question has not received its solution, and that it may be finally found that equitable considerations will justify appeal by stockholders to their governments when wronged, although they are clothed by fiction of municipal law with a new personality through the existence of the corporation in which they are interested.

A most exhaustive discussion of the subject of the nationality of corporations, including the question as to how far it is affected by that of the stockholders, is to be found in the *Revue de Droit International*, second series, 1902, Vol. IV, 381.

#### LIQUIDATORS AS CLAIMANTS

**210.** The right of liquidators to appear and prosecute for the partnership or corporation represented by them was fully recognized in the case of Massardo, Carbone & Co. (Ven. Arb. of 1903, 706), and in the case of Baasch & Römer (Ven. Arb. of 1903, 906), the latter being a partnership. Their prosecution, however, was for the benefit of the persons concerned in the estate, according to the interests they were entitled to present before the commission.

**211.** A like right was recognized in the Chauncey case against Chile, otherwise known as the Alsop case, before the United States and Chilean Claims Commission under the Convention of 1897 (Report of Agent, Opinion No. 26), the majority saying :

Now what is the status of a commercial society in liquidation, and of its liquidator? It is a well-settled principle of the civil law that commercial societies continue to exist in liquidation just as a corporation in the United States continues to exist during liquidation. This principle is declared in most of the codes and is recognized by the courts in all countries where the civil law is in force.

Citing many illustrations, the majority of the commission added: "It is plain that the question of denationalization or expatriation of an individual does not enter here."

That an assignment in bankruptcy passes to the assignee the bankrupt's claim against the respondent nation is a fair inference from the Ruty case (Boutwell's Report, 93).

An assignee for the benefit of creditors was treated as upon the same footing in the respect under discussion as any other assignee, in the Christern & Co., Liquidators' case (Ven. Arb. of 1903, 597).

#### ASSIGNEES AS CLAIMANTS

212. That a claim may be assigned we shall have occasion to see under the heading of "Claims," in this connection discussing particularly the Camy case (Boutwell's Report, 91). Other authorities to like effect may now be mentioned. In the case of Norton, Palacio, Mexican commissioner, speaking for the commission, Mexican-American Claims Commission under the treaty of 1868 (Moore, 2163), said:

The laws of all countries and the records of all courts suggest a single solution of the question, which is, to declare the assignee to be the person in whom is vested the formal and perfect right to make the petition and institute the suit for the thing assigned. Now it is evident that he has all the right he can use effectively, and toward third persons and to all courts, the assignor, once possessor of the right, has lost it as completely as if he had never held it, to such an extent that if he were sued in such a case and the judgment were against him no exception *rei judicatae* could be alleged against the assignee, who might justly term such a sentence *res inter alios acta*. But it would be just the contrary with a judgment given in a suit prosecuted by the assignor, for the action certainly would then perish in such a manner that it could never be revived.

213. The umpire of the last-named commission in the Hargous case (Moore, 2328) fully recognized the effectiveness of the assignment, but declined to recognize the claim because of its original German character, which could not be divested by transfer to an American citizen; likewise in the Parrott & Wilson case, United States and Mexican Claims Commission of 1839 (Moore, 2381), a claim was rejected, having been originally Mexican and only becoming American by assignment.

214. Again, under the United States and Peruvian Convention of 1863, the umpire recognized assignments as proper, holding, in the Eldredge case (Moore, 3462), "that it was not denied that the Aldao bill was unexceptional in its origin; that its transfer to Eldredge, though informal, was valid; and that it constituted a valid claim."

215. In the case of the *Sir William Peel* (Howard's Report, 107) the United States demurred, urging that "the assignment to Edward Girard was void and the purchase and prosecution of the claim by him was barratrous, against the rules of international law, and against the public policy of both Great Britain and the United States." On behalf of Great Britain it was "claimed that the validity of assignment of claims like the one under consideration had been distinctly recognized by the Supreme Court of the United States and by every international commission convened under treaties to which the United States were parties." The American demurrer was overruled, and the rights of assignees were again recognized before the same commission, and the same conclusion reached, in the case of the *Volant* (Howard's Report, 118).

The same commission, however, in the Coleman case (Hale's Report, 98) refused an award to American assignees of a claim against the United States which was originally British, apparently considering with propriety that the commission lost jurisdiction, such a transfer to citizens of the respondent nation being made.

A like ruling was made by Thornton, umpire of the Mexican-American Commission of 1868, in the Barnes case (Moore, 1353).

In the Bance case (Ven. Arb. of 1903, 172) the commission declined to recognize American creditors of a bankrupt as having a right to claim when there was a receiver in bankruptcy who represented the estate and all creditors.

216. It is to be noted that Barge, umpire of the American-Venezuelan Commission, in the Orinoco Steamship Co. case (Ven. Arb. of 1903, 72, 91) held that under the contract, — the concession providing that it might be transferred to another person or corporation upon previous notice to the government, such notice not having been given, — the transfer was null and void; but this expression of opinion does not affect the particular point under discussion.

#### CREDITORS AND MORTGAGEES AS PARTIES

217. The question as to whether creditors of a person suffering injury have a right to claim before a commission, came several times before the Spanish-American Commission, and it was repeatedly decided that they had no footing because of wrongs committed toward their debtor. This was the holding in the Mora & Arango, Benner, and Rodriguez cases (Moore, 2336), it also being the holding in the last case that "the embargo of an estate which was mortgaged to the

claimant, but of which he had neither the legal title nor possession, afforded no ground for a claim of damages."

218. Mortgagees have, however, been recognized as entitled to claim; as, for instance, Barker, mortgagee of the *Circassian*, and others (Hale's Report, 141). And so also have insurance companies who have paid losses: Royal Exchange Assurance Corporation and others in the case of the steamship *Circassian* (Hale's Report, 141); John Reilly, manager, in the case of the brig *Springbok* (Hale's Report, 117); Gerard (Hale's Report, 100).

219. In the Bance case (Ven. Arb. of 1903, 172), Paúl, Venezuelan commissioner, speaking for the commission, said that the receiver was the only person entitled to be heard, and that "it is not possible to consider any individual credits from the total estate as the private property of any one creditor."

Nevertheless, in the Heny case (Ven. Arb. of 1903, 14), where the owner of the estate had given an instrument which was considered by the umpire as neither a mortgage nor a sale of the estate, but as more nearly representing the species of contract known as an anti-chresis, and the military forces and the successful revolutionary government had completely devastated the property, the umpire, considering that it was the intention of the parties that no one but the claimant should have the right to appropriate anything belonging to the estate, or to profit by its revenues, at least so long as such interest should last, concluded that equity demanded that he should be indemnified who directly suffered the loss, and, there being no question of the claimant's interest, he was allowed the benefit of the recovery, although his instrument of ownership had not been recorded.

## CHAPTER V

### CITIZENSHIP OF PARTIES

#### NECESSITY OF CITIZENSHIP WHEN CLAIM AROSE OR WAS PRESENTED

**220.** With extremely rare exceptions, and such exceptions based upon the particular language of treaties having exceptional circumstances in view, the language of commissions has been that the claim must be founded upon an injury or wrong to a citizen of the claimant government, and that the title to such claim must have remained continuously in the hands of citizens of such government until the time of its presentation for filing before the commission. This rule and the reason for it were discussed quite at length in the Abbiatti case (United States and Venezuelan Claims Commission, 84 ; Moore, 2347), the commission saying :

In claims like this they must have been citizens at least when the claims arose. Such is the settled doctrine. The plaintiff state is not a claim agent. As observed elsewhere, the infliction of a wrong upon a state's own citizen is an injury to it, and in securing redress it acts in discharge of its own obligations and, in a sense, in its own interest. This is the key — subject of course to treaty terms — for the determination of such jurisdictional questions: Was the plaintiff state injured? It was not, where the person wronged was at the time a citizen of another state, although afterwards becoming its own citizen. The injury there was to the other side. Naturalization transfers allegiance, but not existing state obligations. Abbiatti could not impose upon the United States, by becoming its citizen, Italy's existing duty toward him. This is not a case of uncompleted wrong at the time of citizenship or of one continuous in its nature.

**221.** In the Fleury case, Wadsworth, speaking for the commissioners, said (Moore, 2156) :

When the memorialist avers that at the time the wrongs were committed and for which the government of the United States now makes reclamation, he was a French subject and does not pretend that he then had the national character of the government asserting the claim, are the commissioners under the necessity imposed by the text of the treaty or considerations of public law, equity or justice, to look into the proofs, if possibly they may thereby correct the statements of the memorial? We can answer this question in the negative with some confidence.

So in the case of Dusenberg (Moore, 2158) the same commissioner held an averment of residence only to be insufficient, adding :

What we hold to be indispensably necessary on the part of the claimant is to show by the memorial that he was, at the time the injury or loss complained of by him was sustained, a citizen of the country whose government prefers his claim before this commission. He can state the facts upon which he bases his claim for citizenship in his own way, but it must appear from the memorial that he was a citizen *at the time of his injury or loss*.

It is said in Moore, 1353 (numerous cases being cited), that before the Mexican-American Commission of 1868, "while in some of the earlier cases the decisions as to what constituted citizenship within the meaning of the convention were exceptional, it was uniformly held that such citizenship was necessary when the claim was presented as well as when it arose."

222. Bartholdi, umpire of the Spanish-American Commission, in the Prieto case (Moore, 2340) decided : "As the claimant was not a citizen of the United States of America when the authorities of the island of Cuba placed an embargo upon his property in the said island of Cuba, it is my opinion that the case should be dismissed." A like conclusion, the circumstances being similar, was reached by Count Lewenhaupt, umpire of the same commission, in the case of Simoni (Moore, 2347).

Similar language was used by the same umpire in the O'Farrill case (Moore, 2339), while Mr. Lowndes, American commissioner of the same commission, in an opinion concurred in by his Spanish associate, in the case of De Acosta y Foster (Moore, 2347), said that "the claimant was duly naturalized as a citizen of the United States after the embargo of his property. It has been decided by the umpires that the commission is without jurisdiction in such a case."

223. The general subject received much consideration in the Stevenson case (Ven. Arb. of 1903, 438), the umpire citing many authorities to the rule we have above laid down.

In the Corvara case (Ven. Arb. of 1903, 782) it was held that, the claim being vested in Italian heirs, and the original claimant never having been in position, through forfeiture of Italian citizenship, to maintain his rights before an Italian-Venezuelan Commission, the Italian government could not urge it upon the commission, and the umpire added (page 809) : "A long course of arbitral decisions has emphasized the fact that the claim must be both Italian in origin and Italian in ownership before it can be recognized by an Italian Commission."

Among other cases to the general effect above indicated is that of King & Gracie (United States and Great Britain Claims Commission of 1853, 305, 309; Moore, 2331), wherein the commission held: "No persons can prosecute claims here but citizens of either country against the government of the other." See also *Macedonian* (Moore, 1465); Laurent (United States and Great Britain Claims Commission of 1853, 120); Henriette Levy (French-American Claims Commission, Boutwell's Report, 71; Moore, 2514); Knox (Mexican Commission of 1868; Moore, 2166); Brignone (Ven. Arb. of 1903, 710).

**224.** In the Peck case (United States and Venezuelan Claims Commission, 419) a part of the claim was rejected, because of noncitizenship, the commission saying: "The rest of the claim appertained to his children and their mother, and cannot be considered by us. For they were not citizens of the United States, and have, consequently, no standing here under the treaty."

Citizenship of claimant must be in demandant nation when the commission is instituted, as was held in the Perché case (Boutwell's Report, 41; Moore, 2401).

**225.** The commissioners appointed under the act of 1849 with reference to claims of American citizens against Mexico (Moore, 2325) said, in the Jarrero case:

The object of these provisions [referring to claims of citizens of the United States] was not to pay the debts of Mexico, but to obtain for our own citizens such indemnity as they were entitled to receive. It matters not that the claim was American in its origin. It had ceased to be American at the date of the treaty, and the holder of it could not invoke the interposition of our government for his protection.

The claims of Edward Dwyer and J. H. Grammant (Moore, 2322) were rejected by the same commission on the ground that the claimants, former citizens of Texas, were not citizens of the United States when the injury complained of occurred. (See also Wilson & Parrott and Dimond cases, referred to in Moore, 2386.)

**226.** In the Morrison case (Moore, 2325) the same commission held that the claimant must show "that he was a citizen of the United States at the time that the treaty was made. He must also show that he was a citizen when the claim originated."

#### DECLARATION OF INTENTION

**227.** The effect of a declaration of intention as touching the question of citizenship has received rather frequent attention at the hands of commissions, and while the holdings have been generally uniform

in declaring that a declaration of intention is insufficient to work a change of citizenship so as to entitle the person making it to the rights of a citizen in the country to which he has commenced the transfer of his allegiance, there have been special conditions creating questions of interest.

In the earlier days of the Mexican-American Commission of 1869, the Mexican commissioner was apparently willing to give a qualified effect to a declaration of intention. From Moore, 2712, we learn that in the cases of Jarr and Hurst the Mexican commissioner conceded that claimants might be heard as citizens of the United States; he inclined to the belief that a person domiciled in the United States who had made a declaration of intention might be admitted to a hearing on two conditions: (1) that he should not fail to complete his naturalization; and (2) that his claim to protection should "be essentially attached to his real and actual presence" in the United States.

In the Perez case before the same commission (Moore, 2719), it was declared that "the fact that, many years before, claimant had declared his intention to become a citizen of the United States is of no value, when, without executing that intention, he goes abroad, not on a visit of pleasure or business, *animo revertendi*, but to establish his domicile in a foreign land. This is conclusive evidence that he has abandoned that intention, because he could not subsequently carry it out without keeping up his domicile in the United States."

By the opinion of Lieber, umpire, in the Helman case (Moore, 2717), we are informed that "the commissioners have jointly decided in several cases referred to by Mr. Commissioner Wadsworth in his opinion on this case (Caroline Sprotto *vs.* Mexico) that a person declaring his intention to become a citizen and keeping his domicile in the United States, is a citizen of the United States in the meaning of the convention of July 4, 1868."

The later umpire, Sir Edward Thornton, in the Schreck case (Moore, 2720), acted upon the principle that the word "citizens" in the convention meant citizenship according to the law of the contracting parties, and declined to recognize a declaration of intention or domicile, singly or together, as conferring citizenship. Mr. Zamacona, Mr. Palacio's successor, seems also to have acted upon that principle. Even in Mr. Palacio's opinions he had insisted upon the qualifications above referred to, in the Kern case (Moore, 2719) using this language:

This commission had already declared that those individuals who, after having taken the preliminary step of declaring their intention to become naturalized



citizens of the United States, leave the United States without completing their naturalization, and establish their domicile in a foreign country, are not entitled to be considered as American citizens.

The position of Sir Edward Thornton was also emphasized in the Gros case (Moore, 2772), where the umpire said :

But it appears to the umpire that he was not a citizen of the United States at the time. He had declared his intention of becoming so, and no more ; but had not actually become a citizen of the United States. The umpire is therefore of opinion that Camille Gros is not one of the persons whose claim is entitled to consideration.

**228.** The views entertained by other commissions have been more uniform. Baron Roenne, in the De Attellis case (Moore, 2549), evidently accepted (but without assigning reasons) the view that the claim of one who had merely declared his intention did not come within the competency of the commission, rejecting the theory propounded by the American commissioners.

So in the Rojas case (Moore, 2337), Baron Lederer decided that the claimant whose domicile was in the United States, and who had made a declaration of intention to become a citizen in New York City, was not "a citizen of the United States within the meaning of the constitution and laws thereof," and could not be "regarded as such citizen according to said agreement" of February 12, 1871.

In the Adlam case (Hale's Report, 14 ; Moore, 2552), it was held that citizenship in the parent nation was not lost by a declaration of intention to become a citizen of another nation.

In the Stevenson case (Ven. Arb. of 1903, 438), Van Dyne's Citizenship of the United States (page 77) was quoted approvingly to the effect that : "International claims commissions to which the United States has been a party have universally decided, whenever the question has been presented, that mere declaration of intention gave the person no standing before a commission as a citizen of the United States."

**229.** A declaration of intention may, nevertheless, have effect in divesting the citizens or subjects of certain nations of their right to claim national protection ; at least it may be strong evidence of such a state of mind or fact as forfeits the right of appeal to the nation of their origin. Thus the French-American Claims Commission (Deucatte case, Boutwell's Report, 80 ; Moore, 2582) decided that : "Under the third provision of the civil code — that French citizenship shall be lost by an establishment in a foreign country without an intent to return (*sans esprit de retour*) — we have frequently decided that the declaration

of an intention to become an American citizen, accompanied by such facts as are proven in this case, are full and satisfactory proof of the loss of French citizenship. In consistency with these decisions, we find that the claimant is not a French citizen, and are therefore obliged to disallow the claim."

**230.** The American Commission under the act of 1849 to settle the claims of American citizens against Mexico, in the Ehlers case (Moore, 2552) said :

The claimant filed his declaration of intention to become a citizen of the United States in 1818, but was not in fact admitted as a citizen according to the act of Congress until the year 1846. A mere declaration of intention to become a citizen of the United States does not vest in the party any political rights. The responsibility of the government to protect a citizen is founded on the right which a government has to his services; and until a party has gone through the forms of law required to establish his character as a citizen, the latter cannot be said to owe allegiance to the government he has signified his intention to obey, nor can such government claim his services.

**231.** By the commission passing upon the Chinese indemnity (Moore, 2332), it was held in the Ryder case :

The imperfect citizenship which the claimant had acquired by his simple declaration of intention had wholly lapsed by his removal out of the territory of the United States into a foreign jurisdiction and establishing himself in business. Apparently Dr. Ryder did not design to mature his "intention" when he removed his domicil to a distant empire. How soon after his declaration before the court he removed to China, the commissioners are not informed, but they have high authority for saying that "the character that is gained by residence ceases by nonresidence. It is an adventitious character, and no longer adheres to him from the moment he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*" (Wheaton, Part IV, Chap. I, Sec. 17).

#### DOMICIL AS DETERMINING CITIZENSHIP

**232.** The question of domicil has repeatedly proven to be important in determining the citizenship of a claimant when there was an apparent or actual conflict between the laws of the nation of birth and the laws of the respondent nation, the claimant having assumed a residence in the respondent nation.

**233.** In the early case of Barclay before the British-American Commission (Hale's Report, 11; Moore, 2721) no question of conflict of laws appears to have arisen, and the holding was that the right of the claimant was not affected by domicil in the defendant nation. The same ruling was followed by the commission in the Crutchett case (Hale's Report, 14; Moore, 2728). The cases of Alexander

and Mogridge (Hale's Report, 15, 16), involving double citizenship, the claimants at the time of the injuries being domiciled in the respondent nation, were dismissed.

234. The question of domicil, however, became one of importance in the de Brissot and de Hammer cases before the United States and Venezuelan Commission of 1889 (Report, 457), and in these cases it was said :

If this question of citizenship were brought before a court of Venezuela, it could not be decided otherwise than according to the Venezuelan Constitution, because only this law would have authority in that case to decide whether the above-mentioned women ought to be regarded or not as citizens of Venezuela, and for the same reason, if it were raised before a court of the United States, it should have to be decided in accordance with the law of 1855, because only that law could determine whether, by their respective marriages with John William de Hammer and Julius de Brissot, they were to be considered or not as United States citizens. But they could neither invoke in Venezuela the law of the United States to repeal that of the place of their birth in respect to their citizenship, nor the law of Venezuela in the United States, to assert, against that of their country by naturalization, that they are Venezuelan ; because as already stated, it is impossible to admit in principle that the application of the domestic law may yield on this point, under any consideration, to the foreign law, nor that one state may arrogate the right of impeding another state in applying the laws it may have deemed convenient to enact in that behalf.

In the cases cited, the law of the United States conferred citizenship upon the foreign women marrying Americans, while the law of Venezuela, like that of the United States up to that point, added that upon their widowhood they resumed their original status.

Exactly the same difference existed between the laws of Italy and of Venezuela, and the question next arose in the Brignone case (Ven. Arb. of 1903, 710), before the Italian-Venezuelan Commission. Umpire Ralston quoted Bluntschli (Sec. 374) as according preference to the nationality of fact, that is to say, that which unites itself with the domicil, and Phillimore (Vol. IV, Chap. XVII, Sec. 368) as declaring "that the law which governs the status is the law of the domicil," and, turning to the decisions of commissions, cited approvingly the de Hammer case, just referred to, the case of Jane L. Brand before the British and American Commission (Moore, 2488), in which it was held that the national character of a married woman was in all cases determined by that of her husband where "the domicil of the wife and widow had continued to be that of the husband's nationality," and commented upon the Calderwood case (Moore, 2486), where the British and American Claims Commission, against the strong dissent of Commissioner Frazer, held that a widow of American birth, always

remaining in the United States, did not regain her American citizenship, but rejected the holding because of the decisions above referred to, and concluded with a reference to the case of Alexander before the British and American Claims Commission (Moore, 2529), in which Count Corti, in an excellent discussion of the subject, said: "The practice of nations in such cases is believed to be for their sovereign to leave the person who has embarrassed himself by assuming a double allegiance to the protection which he may find provided for him by the municipal laws of that other sovereign to whom he thus also owes allegiance. To treat his grievances against that other sovereign as subjects of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject."

235. The position taken in the Brignone case was followed by the same umpire in the Miliani case (Ven. Arb. of 1903, 754) and in the Poggioli case (Ibid., 847), and a like conclusion was reached in the Stevenson case (Ibid., 438) and in the Mathison case (Ibid., 429) by umpire Plumley.

The latter, acting as umpire for the French-Venezuelan Commission under the protocol of 1902 (Ralston's Report, 211, 241), in the Massiani case again declared that the law of domicile "prevails when there is a conflict as held by the umpire in the claim of Maninat Heirs [Ibid., 44], before this same tribunal."

We have already referred to the cases of Alexander and Mogridge (Hale's Report, 15, 16), which were to the same effect.

#### DOUBLE CITIZENSHIP

236. That there may be something tantamount to double citizenship, and that the situation created by it will be taken into consideration by commissions, is a natural inference from some citations already given, and the general rule of commissions may be summed up as being, as indicated, that where a claimant is a citizen by the respective laws of both demandant and respondent countries, no recovery may be had, because it is the right of neither state to force upon the other its laws in determining the question of right, and in parity of right the claim fails.

237. Incidental to this question, commissions have had to determine whether citizenship could be forced upon a person by law, as has sometimes been attempted in South American countries, which in so doing have doubtless had in view the very purpose of disqualifying

the persons designed to be affected by such law from setting up any claim through a foreign country for redress. So in the de Brissot case the United States and Venezuelan Claims Commission, by Andrade, commissioner for Venezuela (Report, 458), reviewing the general subject, declared :

Every independent state has the right to determine who is to be considered as citizen or foreigner within its territory, and to establish the manner, conditions, and circumstances to which the acquisition or loss of citizenship are to be subject. But for the same reason that this is a right appertaining to every sovereignty and independence, no one can pretend to give an extraterritorial authority to its own laws regarding citizenship, without violence to the principles of international law, according to which the legislative competence of each state does not extend beyond the limitations of its own territory. Otherwise, any one could be at the same time a citizen of two states, which is as inadmissible as not to be a citizen of any state at all. " Each individual is by the rule a citizen of one state only, and has political rights only in one state " (Bluntschli, *Droit International Codifié*, Sec. 373).

In the same case the commission held that citizenship acquired by operation of law, as, for instance, that acquired by the marriage of a foreign woman to an American citizen, she continuing to remain in her native land, could not be said to have been acquired consciously and voluntarily, and that her continuance in her native land after becoming a widow, without ever having made any declaration as to her desire to preserve her statutory citizenship, and without ever having come to the United States, showed that she preferred to reassume the citizenship of her nativity, and that to declare her a citizen of the United States against her presumptive good will, would be contrary to the general principles of right and of international law now prevailing. In support of this position the commission cited Fiore, Heffter, and Bluntschli.

238. In the case of Barron, Forbes & Co. (Moore, 2522), Lieber, umpire, declared that " no one can be a citizen in the complete sense of the word (in which it means, indeed, absolute and exclusive incorporation in, and assimilation with a political society) of two states or governments at one and the same time."

#### PROOF OF CITIZENSHIP

239. Citizenship must, as we have already seen as a consequence of what we have said, be alleged in the memorial, and at any rate, if the fact is denied, be proved. In many commissions the mere presentation of the claim by the accredited representative of the claimant country has, in the absence of dispute or circumstances of suspicion,

been treated by the commission as satisfactory. This was notably so before the foreign commissions sitting in Caracas in the year 1903. In certain cases, however, even before these commissions, the sufficiency of the proof was challenged, and in other cases, upon full presentation, as we shall see in a later paragraph, it was held that the facts were such as to destroy all effects which might have been given to the apparent citizenship.

**240.** Some important questions before all the commissions have arisen in connection with proof as to naturalization. It has already been shown that evidence of a simple declaration of intention has generally been regarded as inadequate.

In the *Robinet* case (Moore, 2538), already alluded to, the commissioners held, in the absence of legal proof of citizenship, "that he [had] no right to an award of indemnity for losses sustained in China by reason of the late hostilities and the injuries resulting to trade therefrom."

In the *Tipton* case (Moore, 2545), Thornton, umpire, held that "the commission has certainly a right to expect more positive proof of citizenship than the memorial signed by Tipton and others, and the circumstance of the United States Minister's having helped them in their difficulties."

**241.** Voting or the holding of office was held insufficient proof by Thornton, umpire, in the *Gatter* case (Moore, 2547). Although voting and the holding of office were held insufficient in themselves to prove citizenship, on the other hand voting in the country of another nation, the proof of citizenship not being strong, was held sufficient to rebut an attempt to sustain citizenship in the claimant country. Thus, in the *Barrios* case (Moore, 2535), Thornton said:

The proof in favor of his being a Mexican citizen is not so strong but that it was incumbent on him to rebut this testimony as to his having voted as an American citizen; he was at liberty to do so if he could, but he has failed to do it. With this doubt, the umpire does not consider the claimant's citizenship to be sufficiently proved and therefore awards that the claim be dismissed.

**242.** Bertinatti, in the *Gilmore* case (Moore, 2539), between the United States and Costa Rica, considered that the commission should not accept an incidental mention of the claimant as a citizen of the United States, contained in a protest before a United States consul, as sufficient evidence of citizenship. In the *Wolfe* case (Moore, 2539), before the Mexican-American Commission of 1869, a claimant was refused recognition who had declared his intention but was unable to furnish any evidence of the completion of his naturalization. He had

also a passport and a certificate from a Mexican colonel of infantry as a citizen of the United States, but these were held not receivable as proof that he had been naturalized. The commission said that a copy of the record must be produced, duly certified, or satisfactory evidence furnished that the record had been lost, destroyed, or mutilated, or could not for good and sufficient reasons be found, and that only then could secondary evidence be resorted to.

**243.** Quite in line with the opinion expressed in the case just referred to was that of umpire Thornton in the case of Mantin (Moore, 2540), who, having been shown that the records of the court where he was naturalized had been lost or destroyed, permitted the claimant to give secondary evidence.

**244.** In the Garay case (Moore, 2532), Thornton, umpire, recognized that the certificate of the governor of a state, although he was not officially authorized to issue certificates of nationality, was respectable evidence of the citizenship of claimant, and accepted as proof of Mexican citizenship the certificate of the Mexican Consul General at New York. But the same umpire, in the Warner case (Moore, 2533), held that to the claim of a man to be a Mexican citizen, founded principally upon a certificate signed by a subpolitical chief of the frontier of Lower California and not sworn to, should not be given the same faith "as to that of an officer of so high a rank as the governor of a state, to whose certificate, accompanied by other evidence, the umpire has in some cases given its due weight."

**245.** A consular certificate recognizing a man as an American citizen, and taking his oath as such, was held insufficient proof by umpire Thornton in the Brockway case (Moore, 2534). And the same umpire, in the Trevisco case (Moore, 2531), held that where the claimant called himself a native of Reynosa, not giving the date of his birth, the citizenship was insufficiently proved. That the mere fact of birth was not sufficient evidence of citizenship was also held by the same umpire in the Suarez case (Moore, 2449), in which the claimant had sworn that he was born in New York and produced a certificate of baptism of a child of his name, but did not prove that such child, baptized in New York, was the same person as the claimant.

**246.** It has been repeatedly held by commissions that although the certificate of naturalization affords the best proof of citizenship of one born in a foreign country, yet such certificate is not conclusive upon the commission. The best considered case in which this proposition has been discussed is that of the Fluties before the American-Venezuelan Commission (Ven. Arb. of 1903, 38). In this case

Commissioner Bainbridge, speaking for the commissioners, reached the conclusion that the Fluties, although regularly naturalized, had not been entitled to receive such naturalization, and had committed a fraud upon the court. He expressed the opinion that the certificate of naturalization was not conclusive, the United States being no party to it, according to Attorney-General Ackerman, *in re* Moses Stern (13 Opinions Attorneys-General, 376), a circular of Mr. Fish, Secretary of State, dated May 2, 1871 (Foreign Relations of 1871, 25), and a letter from Mr. Hay, Secretary of State, to Mr. Sampson, June 21, 1902 (Foreign Relations of 1902, 389). The commissioner also referred to a letter from Mr. Evarts, Secretary of State, to the United States and Spanish Commission of 1871 (Moore's Arbitrations, 2599), in which Mr. Evarts declared the commission to be "an independent judicial tribunal possessed with all the powers and endowed with all the properties which should distinguish a court of high international jurisdiction," and having authority "to fix, not only the general scope of evidence and argument it will entertain in the discussion both of the merits of each claim and of the claimant's American citizenship, but to pass upon every offer of evidence bearing upon either issue that may be made before it" (Moore, 2600). He cited the opinion of Bertinatti as umpire of the United States and Costa Rican Commission of 1861, in the Medina case (Moore, 2587), to the following effect :

An act of naturalization, be it made by a judge *ex parte* in the exercise of his *voluntario jurisdicção*, or be it the result of a decree of a king bearing an administrative character; in either case its value, on the point of evidence, before an international commission, can only be that of an element of proof, subject to be examined according to the principle *locus regit actum*, both intrinsically and extrinsically, in order to be admitted or rejected according to the general principles in such a matter. . . . The certificates exhibited by them [the claimants] being made in due form, have for themselves the presumption of truth; but when it becomes evident that the statements therein contained are incorrect, the presumption of truth must yield to truth itself.

In the Medina case, Bertinatti said in addition :

To admit this [the certificates as absolute truth] would give those certificates in a foreign land or before an international tribunal an absolute value which they have not in the United States, where they may eventually be set aside, while Costa Rica, not recognizing the jurisdiction of any tribunal in the United States, would be left with no remedy. Moreover, this commission would be placed in an inferior position, and denied a faculty which is said to belong to a tribunal in the United States.

247. As further stated by Mr. Bainbridge, other commissions have held a similar view. Mr. Lowndes and the Marquis de Potestad,



commissioners in the Spanish-American Commission, agreed upon the following principles (Moore, 2621):

When an allegation of naturalization is traversed and the allegation is established *prima facie* by the production of a certificate of naturalization, or by other competent and sufficient proof, the allegation can only be impeached by showing that the court which granted the judgment of naturalization was without jurisdiction, or by showing, in conformity with the adjudications of the courts of the United States on similar matters, that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment, was practiced upon it, or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law; and that naturalization invests the individual with the rights of a citizen of his adopted country in the country of origin or elsewhere not less than in the country of adoption.

The same commissioners, Mr. Lowndes speaking for them in the Angarica case (Moore, 2622), said: "The fraud which renders naturalization invalid must consist in intentional and dishonest misrepresentation as to a material fact or in the willful suppression of material facts." The same rule was followed in the Criado case (Moore, 2624).

**248.** Count Lewenhaupt, umpire of the same commission, in the Mora case (Moore, 2644) held as follows:

According to the agreement of December 14, 1882, Spain has no right to traverse the certificate of naturalization. In the present case, the certificate is conclusive, unless it be contended that the claimant practiced fraud upon the court. This charge is made. The certificate is still *prima facie* evidence, and it is not the duty of the claimant to furnish any further proof, but, under the rules, the presumption is that fraud was committed if there is proof that the claimant was not bodily present in the United States during the greater part of the five years, or two years, six months and one day.

**249.** The same rule was followed by Thornton, umpire, in the Lizardi case (Moore, 2589), he saying:

The umpire is of the opinion that Mr. Lizardi cannot take advantage of such false swearing nor be considered a citizen of the United States. The court believed that he had resided in the United States for five years and admitted him as a citizen; but the court was deceived by a false oath, and the umpire must consider the certificate as null and void.

**250.** In the Kuhnagel case (Moore, 2647; Boutwell's Report, 74), cited approvingly in the Bouillotte case (Boutwell's Report, 77; Moore, 2650), it was held that the certificate of naturalization may be regarded as null and void for misrepresentation of material facts.

**251.** Other questions of evidence of minor importance relating to citizenship have been touched upon in several cases. In the Delgado case (Moore, 2260), Spain was held not to have produced sufficient

evidence to traverse the naturalization of the claimant, and therefore the claimant was recognized as being an American citizen.

In the Esteves case (Ven. Arb. of 1903, 922) a consular certificate of registration was held sufficient proof of the retention of Spanish citizenship by a Spanish-born claimant, the Spanish law providing that Spaniards transferring their domicile to foreign countries were under obligation to prove in every case that they had preserved their nationality, and so to declare to the Spanish diplomatic or consular agent, who was obliged to enroll them in the registry of Spanish residents.

In the Wilkinson case (Moore, 2532) the memorialist had stated his birth in Kentucky and its time, and the umpire remarked that "unless this statement can be proved to be false, the umpire thinks he must be considered to have proved his citizenship." This observation was confirmed by the same umpire in the Rose case (Moore, 2532).

In the Masson case (Moore, 2542), Thornton, umpire, held the claimant in default, he having asserted that he became a citizen of the United States by virtue of the annexation of Texas, but having failed to prove that he was first a citizen of the republic of Texas.

Somewhat similarly he held, in the Vallejo case (Moore, 2534), that claimants claiming to have been born in Upper California, to have resided there when the treaty of Guadalupe Hidalgo was signed, and to have become citizens of the United States through that treaty, furnishing no other evidence, had insufficiently proved their citizenship, and should have established independently that they were residents of Upper California at the time of the signature of the treaty.

The period of service on an American vessel was regarded by the Mexican commissioner in the Jarr and Hurst cases (Moore, 2713) as forming part of the time necessary to complete naturalization.

In the Goldbeck case (Moore, 2508), Thornton declined to recognize the naturalization of a father (much less a stepfather) as sufficient to naturalize children under the laws of Texas when that state was an independent republic.

**252.** In the case of Barclay, administrator of Bolling (Moore, 2536), arising under the treaty of 1849, it was held as follows :

It is well known that Texas admitted all persons to citizenship, without any oath of allegiance, who were residing there on the day of its declaration of independence, March 2, 1836 (Art. 7, Sec. 10, Constitution, Texas). For anything that appears in the case, these persons became citizens under this provision of the Constitution of Texas. No oath of allegiance could then be required of them. The

presumption arising from the fact of residence that the parties intended to make Texas a permanent domicil and had thereby ceased to be citizens of the United States, should be repelled by clear proof. The board is of opinion that the memorials do not set forth a valid claim against Mexico, and they are accordingly rejected.

#### HOW CITIZENSHIP MAY BE LOST

**253.** Interesting questions have arisen before numerous commissions as to the circumstances under which the claimant may have lost his citizenship in the claimant nation, or, what is a cognate question, the manner in which a claimant, whether losing such citizenship or not, may lose the right to appear successfully before a commission, because of a *pro tanto* loss of citizenship.

**254.** Repeatedly it has been held that one entering the military service of a foreign nation loses his right as a claimant with reference to any demand arising, at least, in connection with such service. For instance, in the Sturm case (Moore, 2757), Thornton, umpire, held that as it was part of claimant's contract with the representative of Mexico that he should resign his position as brigadier general and chief of ordnance of the state of Indiana, and give his whole time and attention to service in the Mexican army, placing himself for the purpose under the orders of such agent and the supreme government of the republic of Mexico, in so far as such service was concerned, the claimant "had divested himself of his nationality as a legitimate citizen of the United States, and has, therefore, no standing before this commission." A similar decision was reached under like conditions in the Greene case, Thornton, umpire (Moore, 2756), in which the claimant was called "*pro tanto* a Mexican citizen during the time of his services."

The commissioners of the same commission, speaking by Wadsworth, in the Lake case (Moore, 2755), likewise rejected the claim, it being for services after the claimant had accepted a commission in the Mexican army. Commissioner Wadsworth said :

His act was voluntary, and by operation of the Mexican law, upon the act, he became a citizen of that country, and while he continued to reside there and serve in the army that relation continued. We do not think he can make a collecting agent of his government for services rendered in Mexico, while he had voluntarily transferred his allegiance to a new sovereign and remained within his jurisdiction.

The Wallace case before Thornton, umpire (Moore, 3476), resulted in a like conclusion, the claimant having virtually accepted Mexican military employment. In the opinion reached by umpire Thornton, he agreed with the American and Mexican commissioners, speaking for

the commission, who by Wadsworth in the Lake case, *supra*, and by Palacio, commissioner, in the Martin case (Moore, 2467), after citing the Mexican law, which provided that "aliens shall be considered as naturalized, by accepting a public office of the nation, or entering her service in the army or in the navy," continued :

It can already be said that all enlightened governments agree that it is an international duty to recognize the naturalization of their subjects in other countries. That duty, it is certain, has not been recognized in all legislations, because, perhaps, it is not in harmony with the national, political, and judicial institutions ; but it has been accepted explicitly or implicitly in international transactions. Thus it has become a part of the law of nations, and now constitutes a rule to decide questions pending between sovereign nations. Consequently it ought to be accepted as a guide in the decisions given by this commission, whenever it may be deemed applicable, as it is, according to our opinion in the present case. John T. Martin, a native of North Carolina, acquired the Mexican citizenship according to the laws of that country ; by that same fact he was deprived of the American citizenship ; and, this being his condition at the time of acquiring the right alleged by him, it is evident that he has no legitimate personality to prefer a claim against the republic of Mexico.

255. This distinction, however, is to be noted between the decisions of Sir Edward Thornton and that announced by Palacio. Sir Edward Thornton rested his opinion upon the general principle that to permit a claimant to recover for sums due him as a consequence of a voluntary act on his part, involving special, although temporary, allegiance to another country, would create an absolutely incongruous situation ; whereas, in the case decided by Palacio, he had in mind apparently only the strict letter of the Mexican law.

256. In the Young case (Moore, 2753) the commissioners under the act of 1849 to settle claims against Mexico held that an American entering Mexican military service forfeited all claim to the protection of his own government while so engaged and for acts then occurring.

257. Other employments than a military one, being accepted by the claimant, have resulted in the rejection of a claim on his part or on the part of his heirs to recover for injuries done him when acting in such capacity.

A case important because of the amount involved, as well as because of the attention given the question, is that of the Corvata heirs (Ven. Arb. of 1903, 782). Corvata, an Italian subject, went to Venezuela at the age of eighteen, entered actively into business, married there, and in 1850 and 1851 represented the government as its confidential agent in the United States. Later, from 1853 to 1856, he

acted as a special diplomatic agent of Venezuela in Europe, in 1857 becoming envoy extraordinary and minister plenipotentiary to various European courts, receiving, about 1859, in addition, a formal appointment as representative of Ecuador in Paris. He rendered other services as well to the government of Venezuela, not important to the determination of this question. By the laws of the Two Sicilies, of which he was a native, it was provided that the condition of any man as a national should be lost, among other things, "by the acceptance, not authorized by the government, of a public employment conferred by a foreign government." The later Italian code contained a similar provision. Corvata had never become reintegrated into the Italian nation.

After an examination of the subject, Ralston, umpire, concluded that his Sicilian or Italian citizenship had been entirely lost by Carvata's acceptance of diplomatic functions, commenting at the same time upon the fact that very respectable authorities, even without the aid of statutes, had reached the conclusion that his actions would sustain the belief that such an abandonment of Italian citizenship, with his long absence and apparent want of intention to return, might imply a forfeiture of his right to any Italian interposition. In addition, he said :

The umpire is disposed to believe that the man who accepts, without the express permission of his own government and against the positive inhibitions of her laws, public and confidential employment from another nation is himself estopped from reverting to his prior condition to the prejudice of the country whose interests he has adopted.

**258.** But it is not every employment which involves the loss of citizenship. In the Cole case, Thornton, umpire (Moore, 2468), said :

The umpire is of opinion that the claimant must be considered to have been a citizen of the United States at the time of the origin of the claims which he had presented. Indeed he believes that he never was otherwise, and that he never was actually in the military service of the Mexican government or received a commission from it, but was merely employed as an artisan in the repair of gun carriages, etc. But even if at one time, and previously to the origin of his claims, he had served in the Mexican army, he had at the latter time entirely left that service, having previously revisited his native country. There can be little doubt that during the war of the intervention the Mexican government did not consider the claimant to belong to the Mexican army, else he would undoubtedly have been called upon to serve in the army.

**259.** Similarly in the Giordana case, before the Italian-Venezuelan Commission (case not reported but referred to in Ven. Arb. of 1903, 808), the umpire had permitted an award in favor of a poor man,

who had spent but a few years in Venezuela, during a year or more of which he had been employed as a government engineer, and in the finding apparently followed the idea of Folleville (*La Naturalisation*, 454), who suggested that, in the determination of the question, "the judge should examine as to the nature, political or not, of the bond attaching a Frenchman to a foreign government," and found no political bond.

260. In the Sharpe case (*Hale's Report*, 15; *Moore*, 2548), before the British-American Commission, it was shown that the claimant had exercised rights of citizenship in the United States by voting prior to the presentation of his memorial, and the counsel for the United States contended that such acts constituted an estoppel, or, if not, they were very strong evidence of naturalization and sufficient to overcome claimant's denial on oath of its existence. An award was made in favor of the claimant, the American commissioner dissenting. It is well known that in many states of the Union, voting is or has been permitted without naturalization, and in such states assuredly the fact that a man had voted would not be evidence of citizenship and could not constitute an estoppel. What the laws were of the particular state where the voting had taken place does not appear in the report.

261. In the Eakin case (*Hale's Report*, 15; *Moore*, 2819) the holding of an office, which, under the laws of Mississippi, could only lawfully be held by a citizen of the United States, brought about a disallowance of the claim; but, as appears from the report, such office-holding, in the opinion of at least a majority of the commission, was in itself a violation of neutrality. The case, therefore, may not be regarded as in point to the proposition that the holding of office in another nation necessarily means a loss of the original citizenship.

Before the Italian-Venezuelan Commission of 1903 a claim was presented by the Italian Legation on behalf of an Italian priest domiciled and exercising the functions of his office in Venezuela; but, it appearing that only a Venezuelan citizen could rightfully so act under her laws, the claim was abandoned.

262. We have already referred to the discussion in the Corvaya case relative to the loss of citizenship through leaving a country without intent to return. The question arose several times before the Spanish-American Commission of 1871. In the Price case (*Moore*, 2565), Bartholdi, umpire, said:

It appears from the papers on record in this case that the claimant, immediately after having been naturalized a citizen of the United States, left the United States for the island of Cuba; that he settled in the said island of Cuba; that he did

not even come back to the United States during the Rebellion. Therefore it is my opinion that the claimant must be considered as having, after he had become an American citizen, left the United States without the intent to return, and that he has no right to appear before the commission.

The laws of the United States not then providing that naturalized citizens should, after a certain time, lose the benefit of American naturalization by resumption of residence in the country of their origin, the correctness of the foregoing cited decision is by no means free from doubt. It is true that then under such circumstances, as now under certain conditions, an American citizen, naturalized or native, because of absence from this country might appeal unavailingly to American authorities for the protection of his rights, but there is a noteworthy difference between the indisposition on the part of the government to present the claim, and the forfeiture of the right of citizenship, rendering a man an incompetent claimant before an international tribunal because of absence from the country with which he had been allied.

The later umpire of the same commission, Count Lewenhaupt, in the Lynn case, — speaking, however, of a native, not a naturalized, citizen, — expressed the idea (Moore, 2570) in the following words :

In the opinion of the umpire it is a generally adopted principle that a settlement abroad with intent to remain may be considered sufficient reason to declare a person divested of the rights of protection abroad inherent to his citizenship ; but this principle implies only that the government of the country of origin may in certain cases make such declaration. As regards the country of residence the rights of foreigners are usually, as in the present case, regulated by treaty.

But mere domicil, as was held by Bertinatti in the Belcher case, Costa Rican Commission (Moore, 2695), and as has been illustrated hundreds of times in other commissions, "does not deprive" the claimant "of the right of claiming the protection of his native government in the case of open injustice, such as is the case of imprisonment without cause and not followed by any trial." Nevertheless, in addition, in the Lavigne and Bister cases (Moore, 2565) the commissioners of the Spanish-American Commission held that a citizen of the United States, of lawful age, leaving the United States and establishing himself in a foreign country, without any definite intention of returning, was to be considered as having expatriated himself ; although Lieber, umpire of the Mexican Commission of 1868, in the Miller case (Moore, 2706), said :

Domicil in a foreign country does not denationalize, unless there be a distinct law to that effect in the native or adopted country of the respective person. If

Miller was an American citizen [he was a native citizen of the United States] when he went to Matamoras, he remained such as long as he remained there, unless he became by some distinct act or other a citizen of the republic of Mexico.

His holding was similar in the Elliott case (Moore, 2481), as was his successor's (Sir Edward Thornton's) in the Bowen case (Moore, 2482).

263. The French law, providing as it does that establishment in a foreign country without the intent to return (*sans esprit de retour*) results in forfeiture of citizenship, presents a situation different from that existing as to native-born under the laws of the United States, and we therefore find, naturally, that, in the Deucatte case (Boutwell's Report, 80), the majority of the commission held, although against the dissent of the French commissioner, as follows :

Under the third provision of the civil code, — that French citizenship shall be lost by an establishment in a foreign country without an intent to return (*sans esprit de retour*), — we have frequently decided that the declaration of an intention to become an American citizen, accompanied by such facts as are proven in this case [fifty-two years' residence, and marriage], are full and satisfactory proof of the loss of French citizenship. In consistency with these decisions, we find that the claimant is not a French citizen, and are therefore obliged to disallow the claim.

Similarly, in the Bouillotte case (Boutwell's Report, 79), the majority of the commission held that "the declaration of an intention to become a citizen of the United States and to renounce all allegiance to France (the first step in naturalization) is *prima facie* proof of the '*sans esprit de retour*.' It may be rebutted by satisfactory proof to the contrary."

264. The Mexican Constitution provided that citizenship should be gained by holding of real estate in Mexico. The effect of this provision several times received discussion before the Mexican Commission under the treaty of 1868. Lieber, the first umpire of the commission (Moore, 2480), in the Anderson and Thompson case decided as follows:

Anderson and Thompson became citizens, it is asserted, of Mexico by acquiring land; for there is a law of the Mexican republic converting every purchaser of land into a citizen unless he declares, at the time, to the contrary. This law clearly means to confer a benefit upon the foreign purchaser of land, and equity would assuredly forbid us to force this benefit upon claimants (as a penalty, as it were, in this case) merely on account of omitting the declaration of a negative; that is to say, they omitted stating that they preferred remaining American citizens, as they were by birth — one of the very strongest of all ties.

Similarly, in the Elliott case, Lieber, umpire (Moore, 2481), decided that American citizenship was not necessarily lost by ownership of real estate in Mexico, although the law provided that it might be gained thereby.



The Anderson and Thompson case appears also to have received consideration by Sir Edward Thornton, umpire (Moore, 2482), it not having been completely disposed of by Dr. Lieber, and Thornton held as follows :

The claimants must be taken to be citizens of the United States, although holding land in Mexico. He is of opinion that that part of the Constitution of Mexico which says that those are citizens who hold land is permissive and not obligatory ; and as the claimants did not take any steps to avail themselves of that permission, that in itself was sufficient proof that they did not wish to do so.

Similar conclusions were reached by Sir Edward Thornton in the Willis, Bowen, Costanza, and Wenkler cases (Moore, 2482).

In the Prim case (Moore, 2482), however, the facts presented were somewhat different :

The claimant asked to be allowed to become a Mexican citizen for the purpose of being able to consummate the purchase of land in the state of Tamaulipas, on the frontier. The permission was granted him, though his naturalization papers were not issued, apparently because he failed to pay the legal fees. But in the following year, 1863, he purchased real property ; and not only did he purchase it, but it was on the frontier, where foreigners were prohibited by law from holding real property ; he thus doubly became a Mexican citizen.

**265.** Citizenship may also be lost by collective naturalization. A question with regard to this arose in the case of Henriette Levy, before the French and American Claims Commission (Boutwell's Report, 71). The claimant was a resident of Strasburg (then in France) when Alsace was ceded to Germany. She never availed herself of the privilege of preserving French citizenship, and was therefore regarded as being within the collective naturalization including all residents of the territory not making their option within the time fixed.

**266.** The question of the right of election within a reasonable time, where otherwise the claimant would have been included within a collective naturalization, arose in the case of Joseph W. Scott against the United States (Hale's Report, 16). It was contended on the part of the United States that the claimant's ancestor, having been a resident of the then province (afterwards state) of Maine at the time of the recognition of the independence of the colonies, was included within the collective naturalization that then took place. On the other hand, it was urged that at some time between the ages of twenty-one and twenty-six he had exercised an option to preserve his British citizenship by removing to New Brunswick. A majority of the commission held that this removal entitled him to be considered a British subject, he having elected such citizenship within a reasonable time after majority.

267. Of course, as appears necessarily to flow from decisions already cited under the general heading of citizenship, the right to appear as a claimant would be lost by a transfer of citizenship from the demandant to the defendant nation after the claim arose and before its submission, and such was the view of the commission in the Gribble case (Hale's Report, 14).

268. A case absolutely unique was that of Petit, arising before the French-American Claims Commission (Boutwell's Report, 81). The claim in this case arose in 1863. The claimant, originally a French citizen, was naturalized in Louisiana in 1868. In 1870 he left the United States, returned to France, and reassumed his nationality as a French citizen, and up to the time of the presentation of his claim continued to be such, and had been recognized by the French authorities. In September, 1881, five months after his original memorial was filed, he was reinstated as a citizen of France by the act of the French authorities. The commission made an award in his favor. The inference from the case as reported is that jurisdiction was found in the facts that he returned to France in 1870 and had acted as a French citizen, and been so accepted, for a period of ten years or more previous to his formal reinstatement in citizenship by the duly constituted authorities.

The decision of the commission can hardly be recognized as sound, in view of the rule already stated, and fortified by so many opinions, that the claim must have been continuously the property of a citizen of the demandant government from its origin to the time of its presentation, or at least to the time of the signing of the treaty providing for its determination, as it will be noted that Petit was French when the claim originated, and was American by naturalization, at least from 1868 to 1870 and perhaps until 1881, at one or the other of which dates, and presumably the latter, he became reintegrated by the formal action of the French authorities into the body of the French nation. It thus appears that there was a break in the continuity of his French citizenship, and it would seem to follow that this break should have disabled him from successful presentation of the claim. This particular point, however, does not appear to have been urged upon the commission.

269. We have already sufficiently discussed under the head of "Double Citizenship" those cases in which, although from certain aspects the claimant was a citizen of the claimant country, he had, by domicil and incidental conflict of laws, placed himself under the control of the respondent government, giving it also a right to treat him as a citizen.

## CITIZENSHIP OF ADMINISTRATOR

**270.** Interesting questions have arisen as to the necessity of citizenship in those acting in a representative capacity as administrator. It has been generally held that the important question is as to the nationality of the claimant, and not of the administrator (Wiltz case, Boutwell's Report, 69), although in the case cited the majority of the commission considered that the petition of the administrator should show citizenship of heirs in claimant nation and his authority to appear for them. The matter is more largely discussed under the head of "Parties."

**271.** It has twice been decided that when the original claimant dies subsequent to the signing of the treaty and to the presentation of the memorial, even a citizen of the respondent nation will be recognized as having a right to proceed before the mixed commission. The first case of this description was that of Chopin (Boutwell's Report, 83; Moore, 2506). One of the persons originally entitled died after the presentation of the memorial and during the pendency of the proceedings, leaving children born in the United States, whose right to share in the award was fully recognized by the commission, although no opinion appears to have been rendered.

This case was followed by Plumley, umpire (Stevenson case, Ven. Arb. of 1903, 438, 455), and the reason is thus stated :

From the testimony received from the respondent government since the umpire returned to the United States of America, there appears, casually, a statement that Juan had deceased recently. Since no reference is made to this fact by the representative of the respondent government, the umpire has a right to assume that such government regards the incident of his death not to disturb the status fixed in him at the time of the presentation of this case to the mixed commission. The Chopin case, found in Moore, *International Arbitration*, page 2506, is full warrant for such a conclusion. Such would be the opinion of the umpire independent of the Chopin case. It meets the requirements, viz. (a) British citizenship at the time of the origin of the claim; (b) British citizenship at the time of the presentation of the claim before the commission. When thus presented, a right to recover is vested in those then having a lawful claim. The decision of the umpire is therefore unaffected if since then Juan has deceased.

## DUTY TO MAKE CITIZENSHIP KNOWN

**272.** Under the language of certain protocols it has been construed to be the duty of a foreigner desiring to avail himself of his citizenship to make it known to the representative of the offending nation at the time the offense was committed. This rule was fully

recognized by the Spanish-American Commission, and in virtue of it claimant's rights were held forfeited for the want of the giving of such notice. So in the Casanova case (Moore, 2572), Lowndes, American commissioner, speaking for the commission, said: "I think that the duty of a foreigner when arrested, if he desires to protect himself by his citizenship, is to give notice of it and to claim the rights he may possess by virtue of his nationality." In this particular case the umpire found that "the Spanish authorities had every reason to believe that the claimant was a Spaniard. It is not proved that on his arrest, or during his detention, he claimed immunity as a citizen of the United States."

A like view was subsequently expressed by the Spanish arbitrator of the same commission in the Zenea case (Moore, 2570), in which a passport from the so-called Cuban Republic found on his person, and in which he was spoken of as a citizen of the United States, was held not to constitute notice, and reference was made to the giving of similar decisions in the cases of Wilson, Delgado, and Portuondo (Moore, 2567). Nevertheless, in the Zenea case, the sum of \$1700 having been found on claimant's person at the time of his arrest, the want of notice was not held to affect the right to recover therefor.

Under the title of "Aliens" we sufficiently discuss the imperfection attaching to a claim because of unneutral conduct not involving a loss of citizenship but necessarily causing a loss of right to national protection; and other phases are discussed under the head of "Parties."

## CHAPTER VI

### PROCEDURE

#### AGENTS AND COUNSEL

**273.** After the exchange of ratifications of the protocol the first step usually is — where the matter in dispute is single in character, or at least where the matters in question are limited in number — the exchange of the “cases” of the respective parties, and the counter-cases, with any reply. (By the term “case” is meant a full statement of the position of the party presenting it, with a summary of the law and facts, coupled with any fortifying exhibits.) The manner of service of these documents, which should be as complete in themselves as it is possible for the contending governments to make them, is usually fixed by the protocols, and, in the absence of such provisions, service may be had upon the opposing foreign office. These “cases” are ordinarily prepared and signed by the agents and counsel of the contending parties, with respect to whose powers and functions it may now be proper to make an explanation.

**274.** Even in the absence of special provisions in the protocols referring to the creation of an agent, it is proper that one should be appointed. Upon this subject the Hague convention of 1899 provided, Article 37, as follows :

The parties have the right to appoint delegates or special agents to attend the tribunal, for the purpose of serving as intermediaries between them and the tribunal. They are further authorized to retain, for the defense of their rights and interests before the tribunal, counsel or advocates appointed by them for this purpose.

The convention of 1907, dropping all reference to delegates in its Article 62, provides as follows :

The parties are entitled to appoint special agents to attend the tribunal to act as intermediaries between themselves and the tribunal. They are further authorized to retain for the defense of their rights and interests before the tribunal counsel or advocates appointed by themselves for this purpose. The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the power which appointed them members of the court.

As will be noted, the convention of 1899 contained no restriction upon the appointment of a member of the Permanent Court to act as an agent, counsel, or advocate before a tribunal of that court on behalf of one of the parties litigant. In the *Pious Fund* case, M. Beernaert, a member of the Hague Permanent Court, appeared as counsel for Mexico, and, upon the insistence of the beneficiary of the claim, M. Descamps was recognized as one of the counsel addressing the tribunal on behalf of the United States. These circumstances led to considerable adverse criticism, and when, in 1903, a later tribunal of the court was called upon to consider the *Venezuelan Preferential Question*, the counsel for Venezuela addressed a letter to the administrative council (Penfield's Report, 134), calling its attention to the inadvisability of the appearance of members of the Permanent Court as counsel for litigants before the tribunal. To this suggestion the French agent demurred, claiming the right on behalf of France to be represented by a member of the Permanent Court (Penfield's Report, 136). Thereupon the matter was dropped. The subject received further consideration, as indicated, at the hands of the conference of 1907, with the result shown in the above paragraph.

275. The powers of the agent before an international tribunal are exceedingly large, and comprehend generally, in addition to special authority to represent the government, all the faculties which would pertain to counsel. In the more important cases, however, a clear line of distinction has been recognized; for instance, in the matter of the *Fur Seal Arbitration* (Moore, 910), after the agent of the United States had offered certain motions, Sir Charles Russell interposed, suggesting that such motions should be made by counsel. The president observed that the official representatives of the governments were their agents, and that counsel acted with the agents, but that they must agree between themselves how they would proceed. Mr. Phelps then said that Mr. Foster was on the point of reading the motions, but was not intending to address the court in support of them. Mr. Foster said:

I fully concur with the president of the tribunal as to my duties. I appear here to present a motion on behalf of the government of the United States. When I have presented that motion it will be the pleasure of the counsel of the United States to argue that motion. In the proper discharge of my duty, I rise for the purpose of reading and laying before this tribunal a motion.

Upon the president's inquiring whether British counsel protested against this mode of procedure, Sir Charles Russell replied that they did not wish to do so. The president then said: "We will not

recognize the agents as arguing the matter. We recognize them as representing the government. Counsel will argue the matter and we will dispose of it." Mr. Foster then read the motions and counsel proceeded to argue them.

The powers of the agent have been rarely fixed by treaties, perhaps the fullest description of his powers occurring in Article 2 of the Convention of February 8, 1853, for the adjustment of claims of citizens of the United States against the British government, and of subjects of Great Britain against the United States. This article authorized the commissioners "to hear, if required, one person on each side, on behalf of each government, as counsel or agent for such government, on each and every separate claim," and further directed that "it shall be competent for each government to name one person to attend the commissioners as agent on its behalf, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof."

**276.** Of course the power of agent or counsel before an umpire, when he sits separately from the commissioners, is the same as before the commission itself, and it was so held by Count Lewenhaupt of the Spanish-American Claims Commission (Moore, 2192), he deciding "that the advocates are authorized to appear before the umpire, in person or by written or printed arguments, memorials, or application."

Before the Chilean Claims Commission (Moore, 1474) certain briefs containing offensive matter were directed by the commission to be withdrawn, and it was ordered that in future the briefs of private counsel be considered by the board only when it appeared that they were presented with the approval and upon the responsibility of the agent of the government in behalf of whose citizens the claim was filed.

So the Spanish-American Commission (Moore, 2184) declined to receive a petition from certain claimants asking an extension of time for the taking of depositions except through the advocate of the United States, on whose subsequent presentation it was granted.

**277.** The Venezuelan protocols of 1903 provided generally for the reception of oral or written arguments submitted by the agent of each government, recognizing no other person as having a right to appear. Acting under such a protocol, the American agent, while adopting in certain cases arguments prepared by the attorneys of private claimants, did not consent to their appearance in person before the commission.

**278.** Interesting questions with relation to the powers and duties of agents arose before M. Asser, arbitrator of the differences between

the United States and Russia with relation to certain whaling claims. Mr. Pierce was named as the American agent and counsel, and his nomination as such notified by the United States to Russia. The protocol containing no reference to the appointment of an agent, and a difference having arisen as to the juridical consequences of his acts, Mr. Pierce presented the following memorandum to M. Asser, under date of June 18, 1901, for his decision :

1. Must not the party defendant recognize the agent and counsel named by the complainant to represent it in the arbitration ?
2. Must not the defendant party accept as official the communications emanating from the agent and counsel of the complainant party, and likewise must it not transmit its responses to the said agent ?
3. Must not the defendant party accept from the agent and counsel of the complainant party as officially delivered copies of the memoranda or other documents transmitted to the arbitrator, and deliver as well directly to the agent and counsel of the complaining party official copies of its answers to the memoranda or other documents that it will transmit to the arbitrator ?

The Russian government had taken the position that its memoranda should be sent to the American government through the Russian ambassador at Washington.

The arbitrator held that "whereas in an arbitral proceeding each party has incontestably the right of naming an agent or counsel charged to represent it in the suit unless this has been expressly forbidden by the *compromis*, which was not the case in the present arbitration ; and whereas such agent or counsel must be considered as the special mandatory of the party naming him, acts done by him within the limits of his authority are not less valid than if they had been done by the principal ; and whereas consequently in this case the memoirs and other documents transmitted by or to the agent of the complaining party should be considered transmitted by or to the party itself ; whereas, however, these legal consequences of the nomination of a mandatory not anticipated or governed by the *compromis* do not take away from the adverse party the privilege of transmitting to the party itself who has named the agent, the memoirs and documents involved," and concluded that :

1. The defendant must recognize the agent and counsel named by the complaining party to represent it in the arbitration.
2. The party defendant must accept as official the communications emanating from the agent and counsel of the complainant, but is not obliged to transmit its answers to said agent.
3. The defendant party must accept from the agent and counsel of the complainant as officially delivered the copies of memoranda and other documents



transmitted to the arbitrator, but is not obliged to deliver to this agent and counsel official copies of the answers to memoranda or the other documents that it transmits to the arbitrator.

The arbitrator also held that the dispositions of the Hague peace convention of 1899 did not apply in this case, as it was governed by a special *compromis* anterior to the going into effect of such peace convention (*Revue de Droit International*, 1901, Vol. III, second series, 655).

279. The Spanish Commission (Moore, 2184) held that a person who was employed in the office of the secretary as an assistant, and who in that capacity had access to all the papers of the commission, could not be permitted to act as special counsel in any case then or thereafter pending before it, and that notice of the order should be given to him and to the parties for whom he appeared, as they deemed such a relation incompatible with an official function.

#### LANGUAGE

280. It is ordinarily provided that proceedings before commissions shall be recorded in the languages of the respective parties. The question as to the proper language to use has, however, received the special consideration of four tribunals of the Hague Permanent Court. The protocol referring to that body the Pious Fund case being silent upon the question of language to be employed, the tribunal determined that the minutes should be in French, but that the respective parties should be at liberty to make use of English or French before the court. The members of this tribunal all united subsequently in the recommendation that protocols thereafter to be signed should specify the language to be employed. Acting upon this hint, the protocols referring to the Hague the Venezuelan Preferential Question provided (Penfield's Report, 33) that "the proceedings shall be carried on in the English language, but arguments may, with permission of the tribunal, be made in any other language also." Nevertheless, upon the question of language being discussed before the tribunal, it decided as follows (Penfield's Report, 53):

Whereas, Germany, Great Britain, Italy, and Venezuela, by the protocol of May 7, 1903, signed at Washington, declared (Article IV) that the English language should be used in the proceedings; And that none of the powers adhering to the protocol, except France, have made formal reservations concerning the above-mentioned stipulation; And that the reservation made by France has met with no formal opposition on the part of the interested powers; And, whereas, the decision of the tribunal on the languages to be used implies no preference for any

one language, but is dictated only by considerations of convenience having to do with this special case alone; And that it is impossible to expect the members of the tribunal and the representatives of the parties to use languages with which they are not familiar; And seeing that the French language is generally employed in all international meetings and transactions, the tribunal decides:

1. The protocols, the decisions, and the sentence of the tribunal of arbitration shall be drawn up in English and in French, both having the same authoritative and judicial value;
2. The written and printed memoranda shall be drawn up in the English language and may be accompanied by a translation in the language of the power by which they are filed;
3. The oral discussion before the tribunal shall take place in English or in French.

Upon an explanation of this decision being asked, the tribunal declared that:

1. In accordance with Article IV of the protocol of the 7th of May, 1903, that the English language is recognized as the official language of the proceedings, but in accordance with the exact meaning of the said article arguments may be presented in another language only with the permission of the tribunal.
2. That the tribunal, by the decision just pronounced, has admitted, within the limits indicated by this decision, the French language as subsidiary, since it is familiar to the members of the tribunal and to the majority of the representatives of the parties.

281. The question of language was raised before the Hague tribunal in the Japanese House Tax case, and the president of the tribunal announced its decision under Article 38 of the Hague convention as follows: "The French language will be that of the tribunal. Parties will, however, have the right to present either in French or English any of the communications that they have to make to the tribunal."

At the next session, however, the agents of the German, French, and English governments, acting jointly, asked the tribunal to be pleased to admit the employment of the German language under the conditions of the order just referred to. In response to this, Mr. Miyaoka, considering that the motion involved a question of principle, claimed for the Japanese language the same right as would be accorded to other languages, stating, however, that he was under the impression that the prior action of the tribunal had been based on considerations of practical utility, to meet the requirements of international judicial proceedings. He added that, "on condition that the Japanese language is equally admitted, the Japanese delegation declares that it has no objection to the eventual admission of the German language in the pending arbitration." The tribunal reserved its decision and the matter received no further attention.

**282.** In the Mascate case the determination of the tribunal was as follows :

French will be the language used by the tribunal. However, in conformity with the decision taken by the two interested parties and communicated to the tribunal by the ministers of France and Great Britain at The Hague on May 13th last, the two parties will have the right to use the French and English languages, respectively, in the course of the argument. As regards to the protocols and the sentence they will be drawn up in French, but accompanied by an official translation in English.

#### PRESENTATION AND CONSIDERATION OF CASES

**283.** Under the practice of the Hague Court, in the Pious Fund case and other cases, and in accordance with the Hague conventions of 1899 and 1907, all documents to be placed before the tribunal are served upon the opposite parties and put in the hands of its members at or before the opening of the hearing, and those subsequently presented, the protocol not otherwise providing, are received only under the provisions of the *compromis* or with the consent of the opposing party.

**284.** Up to the present, oral arguments have generally been made, an exception being in the Japanese House Tax case, in which the arguments were exchanged and filed in print, and no oral discussion was indulged in. In the Pious Fund case as many counsel as desired to speak on behalf of the United States, the claimant nation, were heard in the opening, a like privilege in replying being granted to the representatives of Mexico, and the United States being thereafter heard by two counsel, the proceedings concluding with two addresses on behalf of the defendant nation.

**285.** Certain questions of procedure arose in the Venezuelan Preferential case, the tribunal first directing an exchange of documents containing the arguments within a fixed time, with the replies thereto two weeks subsequently, no acts or documents to be received thereafter except with the special permission of the tribunal, and with the condition that they should be communicated to all the other parties. In determining the order of discussion, the tribunal (Penfield's Report, 67) provided as follows :

(1) The delegates of the parties (agents and counsel) shall plead in the alphabetical order of the countries which they represent; (2) All the delegates of the parties may take part in the first pleadings; (3) As to the replies, there shall be but one from each party; this reply may be made by one of the representatives of each party, respectively, chosen by that party.

The alphabetical order followed was English.

**286.** The great international commissions, including all those which have so far sat at The Hague, the Alabama Claims Commission, the Alaskan Boundary Commission, and many others, have based their work upon the "cases" prepared on behalf of the claimant nation supported by the documents upon which it expected to rely, with a counter-case similarly fortified on behalf of the defendant nation, and replies and sometimes rejoinders, all of which were exchanged before or at the time of the sitting of the commission itself, at all times in conformity with the protocols; but naturally such has not been the case with regard to claims commissions formed for the determination of a great variety of relatively small contentions. These are each usually presented in the first instance by a memorial, to which there is sometimes filed a counter-memorial, or answer, or it may be a demurrer. In the absence of the filing of any formal pleading, the claims are considered as at issue, a suitable memorial containing the necessary jurisdictional allegations being, of course, filed. As we shall see elsewhere, it has been held by some tribunals that certain defenses, as for instance prescription (Daniel case, Ven. Arb. of 1903, 507), will not be taken into consideration by a commission unless formally invoked by the defendant nation.

**287.** It goes without saying, and is a fair inference from what we have already stated, that, whether so expressed or not in the protocol, commissions have an inherent right to establish rules governing the method of presentation and consideration of cases submitted to them; and this power has been at times carried to an extreme, even so far, in the case of some commissions to which the United States have been a party, as to multiply technical requirements and, possibly, to bring about occasional miscarriages of justice. Such commissions as have been less influenced by the technicalities of the common law, and to a larger degree controlled by the greater freedom in matters of practice prevailing under the civil law, have, at no loss to the cause of justice, obtained results with less burdensome rules. It has indeed been said that the civil law is the law governing the procedure of commissions; this being an assumption apparently based upon its superior antiquity rather than upon any conventional agreement, and only to be accepted with reserve. Nevertheless, the superior influence of the civil law is to be seen in the ready acceptance of affidavits, letters, receipts, prices current, and other documentary evidence, which, in default of strict proof or even with it, would be rejected as incompetent under the common law. It is always to be borne in mind, however, that all of this proof, irregular as it would seem to

a common-law lawyer, is only admitted for what in the minds of the commissioners or umpires it is considered to be worth.

The great bulk of the testimony taken before the commissions sitting in Caracas in 1903 consisted of depositions of witnesses, who, being sworn before a judge and having declared themselves free from the Venezuelan statutory objections as to their competency (relationship, employment by the claimant, and the like), were examined on question and answer, either with or without notice to the representative of the government of the taking of such depositions, which were duly certified by the judicial officers before whom witnesses appeared. The umpires of some of the commissions declined, as is thought with propriety, to recognize objections to witnesses founded upon relationship or employment, or for any other reason, finding nothing in the law of nations or in the protocols justifying the rejection of the testimony of any witness tendered on behalf of the opposing governments, and admitting objections only as going to the effect of the evidence submitted. In at least two cases, as we have occasion to see elsewhere (Cervetti case, Ven. Arb. of 1903, 658; Franqui case, Ven. Arb. of 1903, 934), the claimants themselves were allowed to appear in person and were submitted to examination, although this practice has not been usual before commissions, which are for the most part limited by their protocols to written or printed documents adduced before them. This subject we shall discuss more at large when considering the subject of evidence.

**288.** We have noted the difference between commissions formed of three or of a larger number of commissioners, and commissions in which the umpire, although sometimes a presiding officer, has no voice, unless a case or question in dispute is especially referred to him. In the latter class the proceedings of the commissioners should show the disagreement and a reference to the umpire as a foundation for his action, and it is necessary to consider his powers as distinguished from those of the commission as a body.

**289.** It was evidently the opinion of Lieber, first umpire of the Mexican-American Commission of 1868, that his authority was something more than that of a judge as ordinarily understood, for he said (Schaben case, Moore, 1301):

The extent of the authority and consequent duty of umpires varies under different circumstances. In some cases he must strictly limit himself to a decision according to law and equity of those points in which the parties differ. . . . At times, however, and especially when nothing distinct has been expressed by the appointing parties, the authority and duty of the umpire comprehend the

conciliatory arbitrament, that power and duty which is possessed by the judges of peace in several countries of the European continent, for instance, in Prussia since the year 1826.

Evidently this was not the opinion of his associates on the commission, for in another case (Lespes, Moore, 1302), in which he recommended, in view of the distress of the petitioner, an allowance of \$1000, they declined to accept the suggestion. In our view this umpire took a mistaken position, the commissioners once having disagreed.

290. The right of the umpire to refuse to receive evidence other than that upon which the commissioners acted was maintained by Sir Edward Thornton, as umpire of the Mexican-American Commission of 1868 (La Abra case, Moore, 1329), although in the case of Green (Moore, 1358), certain evidence which had been before the commissioners not having been transmitted to him, so that his decision was upon only a part of the record in the case, he reconsidered it, so far as the admitted evidence was concerned, but declined to consider fresh arguments submitted by the claimant's counsel. The same umpire, in the Pradel case (Moore, 1355), again refused to receive evidence not before the commissioners. (See also Secs. 309 and 310.)

#### REHEARINGS

291. So rehearings have been repeatedly refused by umpires, either of their own decisions or of those of their predecessors, such being also the stand taken by the commission appointed pursuant to the treaty of Guadalupe Hidalgo (Moore, 1274, Leggett case; Moore, 1278, Schooner *Rebecca and Elisa*), and it being said by Baron Blanc of the Spanish-American Claims Commission that he did not consider himself "empowered to review the formal decisions of the precedent umpires, such decisions being essentially definitive, according to international usages" (Price case, Moore, 2189). The subsequent umpire of the same commission, Count Lewenhaupt (De Acosta y Foster case, Moore, 2188), appears to have entertained the same view.

The position of Count Lewenhaupt upon the general subject matter was set out more at large in his opinion (Moore, 2192), wherein he said :

The umpire is of opinion that the rule generally adopted by courts of arbitration is, that the umpire has no discretionary power to set aside his own decisions; that he has a right to correct clerical errors, so long as the decision has not been satisfied, but that an error of judgment cannot be corrected after due notification of the decision, except if the case be submitted again through the authorized

channels. If a petition for rehearing is submitted by the arbitrators, the duty of the umpire to examine the points submitted is the same as if the case had never been before the umpire, and he has to give a decision; but if one of the arbitrators refuses to certify the disagreement, the case cannot again come before the umpire under the agreement of 1871.

A like decision was rendered by Sir Edward Thornton in the Weil case (Moore, 1329), he holding that the provisions of the convention in effect debarred him from rehearing cases which he had already decided, and deprived each government of the right to expect that any claim should be reheard. In the Amat case (Pious Fund, Moore, 1358), he reexamined his award on the suggestion that it contained an arithmetical error, and, finding such error, corrected it and awarded the proper amount.

**292.** In the Kenney case, before the Peruvian Claims Commission (Moore, 1627), the umpire found that he had no jurisdiction, although in the communication submitting the case to him no particular allusion was made thereto, and considered that he would commit a grave abuse of authority if he should assume to pronounce a sentence. Nevertheless, upon the commissioners requesting him to withdraw his decision on the ground that it was upon a point not submitted to him, and to render a decision upon the merits of the claim, he examined the papers anew and declared it to be not well founded. His doubt as to his right to proceed, finding himself without jurisdiction, was without question well founded.

#### COUNTERCLAIMS AND SET-OFF

**293.** Ordinarily at least, questions of set-off and counterclaim do not, and in the nature of things cannot, arise before an international tribunal. Nevertheless, at the time of the presentation of the Mexican claims against Venezuela before the Mexican-Venezuelan Claims Commission, sitting in Caracas in 1903, there was an exchange of notes and telegrams by virtue of which the commission was authorized to take jurisdiction, as against a single private claim presented by Mexico, of any counterclaims which might be presented by Venezuela (Del Rio case, Ven. Arb. of 1903, 879). In the consideration of these counterclaims, the umpire rejected a claim for duties said to have been unlawfully collected by Mexico on certain cocoa imported from Venezuela and Ecuador, on the ground that Venezuela was unable to fix the amount or name the owners, and, in addition, that the owners of the Mexican claim were not liable except for debts against Mexico which were of an international character. He also rejected a claim for

the value of a ship and cargo said to have been wrongfully made prize, and the proceeds deposited in the treasury of the port of Campeche; this for the reason that the value of the prize belonged by law to the privateer capturing it, and was the property of individuals, and that the antecedents of the owner were not known, neither had his heirs made a claim in this respect from Mexico, and, further, that the claim was not of an international character. He allowed a claim for Venezuela's portion of 8500 pesos fuertes delivered by Colombia in March, 1829, to the Mexican chargé d'affaires, both governments recognizing its validity. He declined to allow a claim for naval aid promised by Colombia for the capture of the fortress of San Juan de Ulúa, on the ground that the ships promised by Colombia never complied with the agreement under which they were to proceed to Mexico, and because of deficiencies of proof.

#### INTERVENTION

294. The right of intervention received consideration before the Franco-Chilean Arbitral Tribunal, which, in discussing the matter in its opinion (page 243), expressed itself as follows:

Whereas the ordinary rules relative to intervention in the matter of international arbitration, according to which "the spontaneous intervention of a third party is only admissible with the consent of the parties who have concluded the *compromis*" (rule proposed by the Institute of International Law, Article 16, Mégnin, *Traité de l'Arbitrage International*, Sec. 268), independently of the fact that they have not been accepted by any state and have not in consequence any obligatory character in this tribunal, are without application in the case; that in effect these rules have anticipated the most frequent case where the parties agreeing to submit a litigation to arbitration are at the same time those between whom the dispute arose, while the Franco-Chilean Arbitral Tribunal was instituted by Chile, France and Great Britain, with the adhesion of Peru, to permit to third parties, that is to say, to the creditors of Peru guaranteed by the guano, to maintain their respective claims to the sums deposited and to be deposited by Chile; whereas, there exist no general absolute principles in the matter of intervention; that certain laws of procedure subordinate the regularity of the intervention to the condition that the intervenor justifies himself by a juridical interest in the solution of the litigation, while others, the French Code of Procedure notably, leave to the judge the most extended powers of judgment and are interpreted by jurisprudence in the idea that the existence of a material interest in fact, or an interest merely purely moral, is a sufficient cause for intervention to be permitted, etc.

One T. Ellett Hodgskin, claiming as an assignee of J. Théophile Landreau, a citizen of France, Hodgskin being a citizen of the United States, sought to intervene and be recognized before the United States



and Chilean Claims Commission (Moore, 3571). The claimant alleged, in effect, that Landreau had been the discoverer of certain beds of guano, and as such under the Peruvian laws was entitled to one third thereof; that, the territories containing the guano having come into the possession of Chile, Chile was responsible for the Peruvian contracts affecting such property. A majority of the commission held that Landreau was "lacking all *jus in re* recognized by the government of Peru, in the aforesaid guano deposits, and said deposits being at that time under the absolute control and possession of said government, that of Chile could legitimately take possession thereof as property of the enemy, in accordance with the rules of law. . . . That . . . Chile having agreed . . . to deposit in the Bank of England fifty per cent of the product of guano already collected or which might later on be collected, to be applied to the payment of debts due by Peru and secured by said guano, subject to the award to be made by an arbitrator, . . . Landreau, if he considered he had a *jus in re* in said guano, could have taken advantage of the medium thus offered him to secure the full recognition of his alleged rights."

J. C. Landreau, as an assignee of J. T. Landreau, appeared before the Franco-Chilean Commission, which declined to recognize jurisdiction over the claim, because of default in promptness in its presentation, and because, even if the application had not been made too late (Opinion, 240), "the claimants can only maintain against the government of Peru purely personal rights, and not provided for by the 'guaranty of guano' in the sense of the Chilean decree of February 9, 1882."

Upon the question of intervention, the Hague Convention of 1907 for the Pacific Settlement of International Disputes provides, Article 84, as follows:

When it concerns the interpretation of a convention to which powers other than those in dispute are parties, they shall inform all the signatory powers in good time. Each of these powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

We shall hereafter have occasion to point out that arbitral decisions, particularly as to boundary disputes, have no validity as against a nation not a party to the cause at issue.

## CHAPTER VII

### EVIDENCE

**295.** Not infrequently protocols determine the character of evidence receivable and make that evidence which, according at any rate to the strict rules of common law, would be regarded as valueless. Thus, in the case of the Venezuelan arbitrations these documents expressly provided that the claims should be decided upon such evidence or information only as should be furnished by or on behalf of the respective governments, and that the commissions should consider all written documents or statements presented on behalf of the respective governments (Ven. Arb. of 1903, 1, 261, 292, 483, 511, 643, 875, 889, 917, and 945).

**296.** As interpreting the language of the protocols, and expressing the general rules and practice of claims commissions, commissioner Bainbridge, speaking for the American Commission in the Lasry case (Ven. Arb. of 1903, 38), said :

The commission, then, is not limited in the adjudication of the claims submitted to it to only such evidence as may be competent under the technical rules of the common law, but may also investigate and decide claims upon information furnished by or on behalf of the respective governments. It has indeed been found impossible in proceedings of this character to adhere to strict judicial rules of evidence. Legal testimony presented under the sanction of an oath administered by competent authority will undoubtedly be accorded greater weight than unsworn statements contained in letters, informal declarations, etc., but the latter are, under the protocol, entitled to admission and such consideration as they may seem to deserve.

The like language in the British-Venezuelan protocol being considered by Plumley, umpire (De Lemos case, Ven. Arb. of 1903, 310, 321), in accord with Mr. Bainbridge, he said, referring to insufficiently verified written documents offered as proof, that "the evidential value of such statements is left to the decision of the tribunal when it considers them; but there is no question that they are to be received and to be given such value as in the given case they seem to be worth."

Thus also, Gutierrez-Otero, umpire of the Spanish Commission, considering proof deficient in form, nevertheless admitted it, holding that "the question of admissibility of proof submitted shall not prejudice its efficacy" (Lozano case, Ven. Arb. of 1903, 930).

297. With the corresponding article of the Netherlands-Venezuelan protocol before him, in the Evertsz case (Ven. Arb. of 1903, 904), Plumley, umpire, examining testimony which was objected to because taken in foreign parts and *ex parte*, without the benefit of cross-examination, held that, though such testimony would not have the evidential force it otherwise might have been given, and while it might be refused admission before courts controlled by definitive or restrictive rules and statutes, nevertheless it was his duty to receive it, the probative force of the testimony being for the tribunal to determine.

298. Following the rules above indicated, letters were received as evidence in the Bottaro case (Ven. Arb. of 1903, 768), in the Plantagen Gesellschaft case (Ven. Arb. of 1903, 631), and in the Lasry case (Ven. Arb. of 1903, 37); current price lists in the Mohle case (Ven. Arb. of 1903, 574); consular certificates as to contents of documents in the Faber case (Ven. Arb. of 1903, 600); *ex parte* affidavits before the Halifax Commission (Moore, 728) and before the Chilean Commission (Murphy case, Moore, 2262), under a treaty permitting introduction of written statements or documents, although their sufficiency was denied; while receipts and other documents have been received in cases hereafter to be referred to in this chapter. Maps and other documents were considered by the St. Croix Commission (Moore, 23), the Fur Seal Tribunal (Moore, 911), the Alaska Boundary Tribunal, and many other commissions, particularly those examining into territorial disputes.

We may add that an extensive discussion of the right of commissions to receive and act upon affidavits and other *ex parte* documents is contained in a footnote to the Faber case (Ven. Arb. of 1903, 600).

299. Before the Venezuelan-commissions of 1903 hearsay evidence was repeatedly offered and as certainly rejected, or at least ignored. Although such instances generally occurred in cases not reported, in the Cervetti case, Ralston, umpire (Ven. Arb. of 1903, 662), said:

Upon examining the record, it was the opinion of the umpire that, although the claim was probably well founded, the proof would not justify any recovery, the claimant's witnesses merely stating that the facts alleged by them were public and notorious, but stating nothing of their own knowledge. The foregoing view being submitted by the umpire to his associates, it was determined that the claimant himself should be summoned before the commission and examined by its members under oath. This course was taken and the claimant appeared and was examined at length on June 25.

This case is notable as affording a rare application of the power of commissions in their judgment to receive statements made by

the claimants in person, instead of confining themselves to written evidence or documents. The practice, however, was several times resorted to in Venezuela, as for instance in the Franqui case before the Spanish-Venezuelan Commission (Ven. Arb. of 1903, 934), and the same course may have been taken by other commissions. In the Franqui case, *supra*, Mérignhac (*Traité de l'Arbitrage*, Sec. 272) was quoted with approval to the following effect :

Then the tribunal will remain free to employ, to enlighten it, all kinds of proof it may believe necessary ; and will not be bound, in this respect, by any of the restrictions that one meets in positive law, especially as to the administration of testimonial proof.

In the De Zeo case (Ven. Arb. of 1903, 693), the witnesses showing no personal knowledge as to any of the details of the claim, but simply indicating their belief, the umpire found himself compelled to reject the claim.

In an earlier case a like rule of evidence was recognized by Thornton, umpire (Cramer case, Moore, 3250), he saying that "the statements as to losses suffered by the claimant in consequence of his imprisonment are utterly devoid of proof and are merely unfounded opinions of the witnesses, who must have derived those opinions from information furnished by the claimant."

#### RECEIPTS AS EVIDENCE

**300.** Receipts given by apparently proper authority have many times been received in evidence. In the Plantagen Gesellschaft case (Ven. Arb. of 1903, 631), Duffield, umpire, accepted unauthenticated receipts, which, however, bore upon their face evidences of the genuineness of their character. In many cases before the Italian-Venezuelan Commission, Ralston, umpire, accepted as genuine and binding the defendant government's receipts given for property taken by military forces, their authenticity being undisputed. In one case, however, an irregularity brought to the attention of the commissioners resulted in an agreement that the receipts were undoubtedly fraudulent. The date given on them was written in full as *mil nuevecientos*, instead of, as good Spanish would require, *mil novecientos*, and in the judgment of the commissioners the error was of such character that the receipts could only have been written by a non-Venezuelan, and therefore bore evidence of fraud upon their face.

**301.** A rule followed in Venezuela (Ballistini case, Ven. Arb. of 1903, 503, and other cases already cited) was that of the Claims

Commission under the Treaty of Washington, which repeatedly held (Ward case, Hale's Report, 41, Moore, 3731; Wilkinson case, Hale's Report, 42, Moore, 3736) that receipts given by competent military officers constituted evidence against the government.

#### INSUFFICIENT EVIDENCE

302. Many claims have been rejected for lack of sufficient evidence, or because of the ambiguous character of that submitted. Some of these have been or will be considered under their appropriate heads. Many others, involving merely the weighing of facts, offer nothing of interest to the student of international law. However, we are justified in referring to several grounds of insufficiency not otherwise classified. In the *C. H. White* case against Russia (Foreign Relations of 1902, Appendix I, 463), Asser, arbitrator, rejected certain claims, saying that "the declarations of the interested parties alone cannot be admitted as sufficient evidence." And Thornton, umpire (Moore, 1355), "refused to make awards in favor of claimants where the only evidence of the injury complained of was the claimant's own statement." "This case," said Mr. Wadsworth, delivering the opinion of the commission in the Welsh and Allen case (Moore, 1356), exhibits a failure of proof and vicious preparation. Nearly all the proofs in the case were taken before one of the claimants as consul of the United States. This cannot be of any value. The case is now dismissed."

Nevertheless, in the *De Lemos* case (Ven. Arb. of 1903, 310, 321), Plumley, umpire, admitted certain proofs which were taken before the claimant as consul, regarding them, as we have seen, as declarations which he was bound to receive, and he allowed himself to be materially influenced by them because they related to facts of public notoriety and, in fact, of history, which, had they been untrue, were easily susceptible of disproof by Venezuela.

The *Sanchez* case (Ven. Arb. of 1903, 937) was dismissed because the evidence as to amount was too vague to enable the umpire to determine it. The same consideration influenced the umpire in the *De Zeo* case, already referred to.

The *Cobham* case was held insufficiently proven by Plumley, umpire (Ven. Arb. of 1903, 409), because the claimant failed to distinguish as to the troops who had committed the injury, whether governmental or revolutionary, responsibility in the one case existing, and in the other being absent.

## BURDEN OF PROOF

**303.** Undoubtedly the burden of proof falls upon the claimants before commissions as in other cases, except in so far as such burden may be removed by the provisions of the protocol. The claimant's case once made out, the burden is transferred to the defendant, and, the burden being so shifted, the language of umpire Plumley in the Feuilletan case (Ven. Arb. of 1903, 406) becomes in point. He said :

Since the service is admitted the burden rests upon the respondent government to show by a fair balance of affirmative proof that recompense has been made. Unfortunately for the respondent government, if their claim of payment is correct, they have not shown it by the statement of any person claiming to know it as a matter of his own personal knowledge, nor by inspection of the vouchers or books which should show such payments.

In the same case, however, referring to another item, the umpire found that the testimony concerning payment was " explicit, positive, and of personal knowledge, and when opposed to the somewhat vague and quite indefinite general statements of the claimant [was] of convincing force and evidential value."

## EVIDENCE IN OTHER CASES

**304.** Commissions have, like the United States Court of Claims, felt themselves at liberty to refer to proof adduced in cases other than the immediate one before them. Thus in the Mohle case, Duffield, umpire (Ven. Arb. of 1903, 574), found it entirely proper to refer to evidence put in in another case (Van Dissel & Co., Ven. Arb. of 1903, 565) by the Venezuelan commissioner, showing the values of property like that in dispute in the case under consideration, the competency of such evidence not having been questioned by the German commissioner in the former case.

## SECONDARY EVIDENCE

**305.** Original evidence having been destroyed, secondary evidence has been held admissible. This was the situation in the Mantin case (Moore, 2540), wherein Thornton, umpire, permitted the claimant to prove by secondary evidence that he had been naturalized, the official records having been lost or destroyed. The admissibility of secondary evidence, the original being destroyed, was also recognized in Wolfe's case (Moore, 2539), before the same commission.

## PRODUCTION OF INSTRUMENT FORMING BASIS OF CLAIM

**306.** The question as to the necessity of the physical production of the instrument made the subject of claim has repeatedly received the consideration of commissions. In the Hammaken case (Moore, 3470), Thornton, umpire, adjudged that if the missing orders should be presented, then he would award a given sum ; if not, a lower amount.

In the Ballistini case (Ven. Arb. of 1903, 503), Paúl, speaking for the commission, the French commissioner concurring at any rate in the result, declined to recognize a claim for certain coupons or bonds because of a failure to present them, as well as for other reasons.

In the Boccardo case, not reported, but referred to in Ven. Arb. of 1903, 505, which was a claim for certain internal bonds, Ralston, umpire, required the production of the bonds before the commission and their physical cancellation at the time of the award.

**307.** In notable contrast with the course taken in the three commissions just referred to was that followed by Filtz, umpire of the Belgian-Venezuelan Commission in the Waterworks case (Ven. Arb. of 1903, 271), who, instead of requiring the production of the bonds before him, gave an award for the full amount claimed upon them, providing for its payment to a bank of Brussels, which was made an agent to distribute a proportionate share of the award to the holder upon presentation of each bond. (For a full account of this case see Sec. 115.) In the Boccardo case, above referred to (Ven. Arb. of 1903, 505), there was both intrinsic and extrinsic evidence that the bonds claimed upon had been delivered directly by the government to an Italian subject, and retained by him until their presentation to the commission, thus avoiding the errors which may well have existed in the proceedings in the Waterworks case.

## EVIDENCE OF OWNERSHIP

**308.** But little in the proceedings of commissions touching the method of proving ownership calls for particular attention. In the *Alliance* case, however (Ven. Arb. of 1903, 29, 31), objection was raised to the right of claimant to recover, the title to the vessel in relation to which the claim was made not resting in him. The commission held, however, that this fact was not conclusive against its American ownership, citing Wharton's International Law Digest, Vol. III, Sec. 410, to the following effect :

The registry or enrollment or other custom house document is *prima facie* evidence only as to the ownership of a ship in some cases, but conclusive in none.

The law even concedes the possibility of the registry or enrollment existing in the name of one person, whilst the property is really in another. Property in a ship is a matter *in pais* to be proved as fact by competent testimony like any other fact.

The commission held, therefore, that if the *Alliance* was, in fact, owned by a citizen of the United States, she was American property and the owner possessed all the general rights of the owner of any other American property.

#### ADDITIONAL EVIDENCE

309. Sir Edward Thornton, umpire of the American-Mexican Commission of 1868 (Weil case, Moore, 1329), refused to receive evidence which had not been before the commissioners, holding that he had no right to do so; and it has generally been the view of umpires that, called upon as they have been properly to review simply the findings of the commissioners, they could only receive the record in the state in which it had been passed upon by such commissioners. Nevertheless, with the consent of the commissioners as to the case at issue, many new items of proof not before the commissioners in the first instance have been permitted consideration by different umpires.

310. In certain cases cited in Moore, 2200, Angarica and others, the commissioners of the Spanish-American Commission, permitted the reopening of the cases before them for the reception of evidence alleged to have been newly discovered since the making of the orders of submission; and in the Duggan case also (Moore, 2201), after the case was closed on both sides, the commissioners granted a motion of the advocate for the United States to reopen it for further evidence. Such a motion before an umpire would properly have failed, his power of review being limited, in the absence of consent, to the case as it came to him on appeal from the commissioners; and in accordance with this rule umpire Thornton acted as we have shown. In one case, however, a way out of the difficulty was indicated by umpire Thornton, who had been asked by the agent of Mexico (Bark *Emily Banning*, Moore, 1355) to receive certain evidence which had come to hand too late to be laid before the commissioners, or else to return the case to the commissioners in order that they might decide whether it should be admitted. The umpire refused to take either course. On the contrary, he said "he considers that it was the duty of the agent to ask for the admission by the commission of these documents, and if the commissioners had disagreed and referred the matter to the umpire, he would have decided the question. As it is, no mention has been made of this testimony by the commissioners, but the umpire



has been requested to give a final decision on the whole case. He has therefore examined the papers which have been submitted to him, and will give his final decision thereupon." In the later case of Wenkler (Moore, 1355) this ruling was affirmed, but nevertheless certain evidence explanatory of the original evidence was ultimately admitted by the commissioners and sent to the umpire. (See also Sec. 290.)

#### REVISION

**311.** The Hague Convention of 1899, providing for the Pacific Settlement of International Disputes, contained this provision, Article 55:

The parties can reserve in the *compromis* the right to demand the revision of the award.

In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence on the award, and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the foregoing paragraph, and declaring the demand admissible on this ground. The *compromis* fixes the period within which the demand for revision must be made.

Acting under this provision, the treaty between the United States and Mexico, referring the Pious Fund case to the Hague Permanent Court of Arbitration, contained a provision by virtue of which revision could be demanded as above provided, within eight days after the announcement of the award (Agent's Report, 165). No advantage, however, was taken of the provision, and members of the tribunal determining the case subsequently commented upon its inadvisability.

#### LEGAL PRESUMPTIONS

**312.** Certain legal presumptions have received the sanction of commissions. For instance, in the Brewer, Möller & Company case (Ven. Arb. of 1903, 584) the umpire referred to the "uniform presumption of the regularity and validity of all acts of public officials."

In the Guerrieri case (Ven. Arb. of 1903, 753) it was said that "the legal presumption would be in favor of the regularity and necessity of governmental acts."

In the Bembelista case (Ven. Arb. of 1903, 900) the umpire remarked that "there is always a presumption in favor of the government that it will be reasonable and will not be reckless and careless,

and in this case the facts proven prevent any possible removal of that presumption."

In the Brun case, French-Venezuelan Mixed Claims Commission of 1902 (Ralston's Report, 5, 25), the umpire refers to "the very proper presumption that the government of Venezuela will always do its duty by its own nationals and by its neutral friends resident within its domain."

In the Friedrich & Company case, French-Venezuelan Claims Commission of 1902 (Ralston's Report, 31, 42), the general presumptions that public officers perform their official duties, and that their official acts are regular and in good faith, received sanction. So likewise in the case of Black & Stratton (Moore, 3138), Thornton, umpire, referring to a claim of illegal seizure, said: "The presumption must be that the authorities acted in accordance with law in confiscating and selling the animals in question, unless there be very strong proof to the contrary; but there is no such proof."

Referring to the same subject in the Valentiner case (Ven. Arb. of 1903, 562), the umpire said that he was of opinion that "under the general presumption of law, in the absence of any testimony to the contrary, the draft must be considered lawful. *Omnia rite acta praesumuntur*. This universally accepted rule of law should apply with even greater force to the acts of a government than those of private persons."

**313.** The presumption relative to the rightfulness of governmental acts is not conclusive, and in some cases where the rule was recognized evidence counter to it was given preponderating weight. A case in which the possibility of rebuttal was expressly recognized was that of Wipperman, United States and Venezuelan Claims Commission of 1889 (Report, 132; Moore, 3042), wherein it was said:

There is nothing in the record to show that the government had any notice of the incursion or any cause to expect that such a raid was threatened, and while it may be true that governments are *prima facie* responsible for the acts of their subjects and aliens commorant within their jurisdiction, this is a presumption which is always rebuttable by any facts which will afford a reasonable excuse for the dereliction against which the complaint is aimed. A different rule of responsibility applies where the act complained of is only one in a series of similar acts, the repetition, as well as the open and notorious character of which raises a presumption in favor of knowledge being brought home to the authorities and with it corresponding accountability.

**314.** The very common legal rule that presumptions are in favor of the defendant, commonly applied as it has been, received express recognition in the Zaldivar case, Spanish-American Claims Commission

(Moore, 2982), wherein the question arose as to whether given destruction had been committed by the Spanish forces or by insurgents, and "in this conflict of testimony the arbitrators held that they must act upon the presumption that exists in favor of the party who defends."

**315.** An unusual recognition of a rule many times laid down by international authorities occurred in the *Sambiaggio* case (Ven. Arb. of 1903, 666, 691), wherein it was "strongly insisted on behalf of the claimant that whatever may be the general rule of international law with respect to the nonliability of governments for the acts of revolutionists, this rule does not find a proper field of operation in Venezuela, the country being subject to frequent revolutions." The umpire said :

To take the position as is asked that Venezuela is in the regard under discussion an exception to the general rule we must have the right to decide, and must actually decide, that Venezuela does not occupy the same position among nations as is occupied by nations contracting with her. Is this justifiable? For about seventy years Venezuela has been a regular member of the family of nations. Treaties have been signed with her on a basis of absolute equality. Her envoys have been received by all the nations of the earth with the respect due their rank. The umpire entered upon the exercise of his functions with the equal consent of Italy and Venezuela and by virtue of protocols signed by them in the same sovereign capacity. To one as to the other he owes respect and consideration. Can he therefore find as a judicial fact, even inferentially (the protocol not authorizing it in express terms), that one is civilized, orderly, and subject only to the rules of international law, while the other is revolutionary, nerveless, and of ill report among nations, and moving on a lower international plane? It is his deliberate opinion that as between two nations through whose joint action he exercises his functions he can indulge in no presumption which could be regarded as lowering to either. He is bound to assume equality of position and equality of right.

**316.** Many times commissions have invoked against a litigant party the legal presumption attaching to the nonproduction of evidence within its power to produce. Thus in the *Brun* case (*Ralston's Report*, French-Venezuelan Mixed Claims Commission of 1902, 5, 25) it was said :

The umpire might hesitate to adopt these findings if it were not true, and had not been always true, that the respondent government could ascertain and produce before this mixed commission the exact facts regarding the positions and movements of its own soldiers, and the position and movements of the insurgent forces, at the time in question. Especial force attaches to this when it is known that the respondent government was asked and urged by the representatives of the French Company and by the representatives of the claimant government to permit the use of its judicial processes and functions, in order that the truth might be established, but the privilege was denied them.

So also in the *M. S. Perry* (otherwise *Salvor*) case (Hale's Report, 123 ; Moore, 3158) and the *Hilja* case (Hale's Report, 151 ; Moore, 3923) the same rule was followed.

In the *De Lemos* case (Ven. Arb. of 1903, 310, 321) the umpire was influenced in his conclusions by the consideration that, were the statements made by the claimant false, the official particulars were undoubtedly with the government of Venezuela, and, they not being furnished, though susceptible of production, he did not hesitate to make an award.

**317.** We do not discuss under this heading the presumption arising out of nonpresentation of claims for extended periods of time, reserving it for the appropriate head of "Prescription," where it is treated as a matter of substantive defense rather than of evidence.

## CHAPTER VIII

### CLAIM

#### DEFINITION OF CLAIM

**318.** Many commissions have been called upon to define the meaning and application of the word "claim," as used with reference to demands pending between nations. In the Scott case (United States and Venezuelan Claims Commission of 1889, 81; Moore, 4392) the commission said :

As we understand it, a claim within the meaning of the treaty implies a *right* on the one hand and an *obligation* on the other. It has reference to some alleged wrongful conduct of the government upon which it is made. That conduct may have been active or passive; the government may have done what it ought not to have done, or refused or neglected to do what it ought to have done, in respect to the subject matter of the claim. And injury or damage must be alleged to have resulted from that conduct to the claimant under circumstances giving him the right under the treaty through his own government, to demand, and imposing on the delinquent government the obligation to allow, indemnity therefor.

**319.** In the United States and Colombian Commission (Moore, 3615), Bond cases, Sir Edward Bruce, as arbitrator, said :

The term "claims" in the convention must be construed so as to confine it to demands which must have been made the subject of international controversy, or which are of such a nature as, according to received international principles, would entitle them on presentation to the official support of the government of the complainant.

**320.** In a decision of a general character, umpire Ralston, of the Italian-Venezuelan Commission (Ven. Arb. of 1903, 651), found it necessary to indicate what constituted a claim, using the following language :

It appears to the umpire that the pro-memorias referred to contain none of the elements of a claim within the natural application of the definition. They are not the demand of a right or supposed right, for they do not inform us of the amount or nature of the right claimed or the wrong inflicted. They assert nothing save that the legation is informed that a certain man claimed something unknown against Venezuela; in other words, that he is a claimant. Before Venezuela can be expected to answer to a claim or demand, she must be informed of its nature. This information is not furnished.

The decision last cited, of course, had relation rather to a question of procedure than to a matter of substantive law, but the language is, nevertheless, entirely applicable as indicating the character which should pertain to a claim.

321. In the Aroa Mines case (Ven. Arb. of 1903, 344), umpire Plumley gathered together a large number of authorities covering the application of the term in a legal as well as in a more general sense. Among the more important ones mentioned by him are those of *Prigg vs. Pennsylvania* (16 Peters, 539), describing a claim as, "in a just juridical sense, a demand of some matter, as of right, made by one person upon another, to do or forbear to do some act or thing as a matter of duty"; and also the language of Judge Deady, in *Dowell vs. Cordwell* (4 Sawyer, 228), cited approvingly by Little, commissioner of the United States, in the United States and Venezuelan Commission of 1889 (Moore, 3623; Report of Commission, 297), to the following effect:

In my judgment a claim upon the United States is something in the nature of a demand for damages arising out of some alleged act or omission of the government not yet provided for or acknowledged. As the term imports, it is something asked for or demanded on the one hand and not admitted or allowed on the other.

Commissioner Little cited approvingly certain Spanish definitions, which may be translated as follows:

*Reclamación.* The act and effect of claiming, *reclamatio*. (1) The opposition or contradiction which is made to anything as unjust, or by showing that it is not assented to, *reclamatio, oppositio*. (2) The demand made for anything by him who has the right of property in it against him who possesses or detains it. — *Salvó*.

*Reclamación.* The opposition or contradiction which is made by word or by writing against anything as unjust, or showing that it is not agreed to; and the claim or demand which a person who has right of property in a thing makes against whoever possesses or detains it. — *Esriche*.

In the opinion of Judge Little, already referred to, occur a large number of other citations, to the effect already given, and the repetition of which is not necessary.

322. In the Boulton, Bliss & Dallett case (Ven. Arb. of 1903, 26), Paúl, speaking for the commission, said:

The word "claim" in its most general meaning and in its juridic sense is equivalent to a pretension to obtain the recognition or protection of a right, or that there should be given or done that which is just and due. In the meaning of the word "claim" there is therefore included any kind or character of demand which involves a principle of justice and equity, and this in the abstract applies to the

jurisdictional faculties of this commission and the circumstances, which in accordance with the especial terms of Article 1 of the protocol limit that jurisdiction. The amplitude of the phrase "all claims" makes it possible that even the demands which are unforeseen by the law, or which, by the absence of proper agreements, lack juridical foundation entitling them to be examined and confirmed under the proceedings of an ordinary court, must be considered by this tribunal of exceptional jurisdiction, which has to decide them upon their merits and upon a basis of absolute equity.

#### CLAIMS WITHIN JURISDICTION OF COMMISSION

**323.** Doubts have arisen whether different classes of demands constituted, according to the particular protocols, claims of which it was the duty of the commission to take jurisdiction. This, as we have seen, has been particularly notable with relation to bonds, and will be considered also under other appropriate titles.

We have found that commissions have generally decided, in the absence of restrictive rules in the protocols, that contract claims, as well as those for offenses against the person, were within their jurisdiction. Bainbridge, commissioner, in the Rudloff case (Ven. Arb. of 1903, 182, 188), in his opinion said :

The taking away or destruction of rights acquired, transmitted, and defined by a contract is as much a wrong, entitling the sufferers to redress, as the taking away or destruction of tangible property; and such an act committed by a government against an alien resident gives, by established rules of international law, the government to which the alien owes allegiance and which in return owes him protection, the right to demand and receive just compensation. Such an act constitutes the basis of a "claim" clearly within the meaning and intent of the convention constituting this commission.

**324.** As is manifest from language heretofore quoted, the claim must be of such a nature as to create an obligation internationally; that is to say, under the rules of international law; and in the Sambiaggio case (Ven. Arb. of 1903, 666) the umpire denied any liability as to Venezuela for the acts of revolutionists beyond her control, and, discussing whether the protocol could be so interpreted as to create such liability, said that such protocol, when given "a natural and logical interpretation," meant that she was responsible and a claim could only be made "for the acts of her authorities of whatever nature, legal or otherwise, or other acts for which she might be responsible from the standpoint of international law."

**325.** In the Fabiani case, French-Venezuelan Claims Commission (Ralston's Report, 81, 117), the umpire, finding that a former treaty

referred to arbitration "the claims of M. Antonio Fabiani against the Venezuelan government," said :

It will be observed, then, that the matter to be submitted for arbitration is the "claims" of Fabiani — not certain claims of Fabiani, not a *part* of his claims, but his *claims*, which clearly and definitely includes *all his claims*, against the respondent government. It would not be more sure, more precise, had it been written "all of the claims of M. Antonio Fabiani," etc.

**326.** In the case of Poggioli (Ven. Arb. of 1903, 847) a question slightly different from that in the Fabiani case was presented. The claim had existed prior to certain negotiations between Venezuela and Italy, which negotiations resulted in an attempt to settle all demands arising from the revolution of 1892, in which the Poggiolis had been severe losers. It was manifest, however, from the consideration of all correspondence and papers, coupled with the fact that the Poggioli claim, although known, was not at the time taken into consideration, that the particular demands then adjusted were those arising from aid, enforced or otherwise, rendered by Italian subjects to the revolution then going on and afterwards successful, and did not embrace matters of damage.

#### CLAIMS OF NATIONS

**327.** Ordinarily before mixed commissions the claims submitted, as we have seen (Sec. 201), are those of citizens or subjects, and not of the government as such. An exception might be considered to exist as to the Alabama Claims, but the difference between the subject matter considered by the Geneva Tribunal and that considered by other mixed tribunals was rather in form than in substance. The award in the Alabama case rendered to the United States a sum which was considered equivalent to the aggregate of all the damages suffered through the offending cruisers by any of the citizens of the United States, this country charging itself with the duty of distributing the award among those who should afterwards be shown to be entitled to share therein. Other claims of nations as such are referred to in the section named.

**328.** The usual language of protocols includes express reference to the claims of the citizens or subjects of the demanding country. The interpretation to be given to the words "citizens" or "subjects" as contrasted with the nation itself is indicated in Section 201.

**329.** In this line, commissions have several times decided that no claim could be made for the insult to the claimant country, matters of



such nature being beyond their jurisdiction. Such, for instance, was the ruling of Plumley, umpire, in the Stevenson case (Ven. Arb. of 1903, 438, 450), wherein it was said :

The attention of the umpire has not been brought to an instance where the arbitrators between nations have been asked or permitted to declare the money value of an indignity to a nation simply as such. While the position of the learned agent for Great Britain is undoubtedly correct, that underlying every claim for allowance before international tribunals there is always the indignity to the nation through its national by the respondent government, there is always in commissions of this character an injured national capable of claiming and receiving money compensation from the offending and respondent government. . . . To have measured in money by a third indifferent party the indignity put upon one's flag or brought upon one's country, is something to which nations do not ordinarily consent. Such values are ordinarily fixed by the offending party and declared in its own sovereign voice, and are ordinarily wholly punitive in their character — not remedial, not compensatory.

Again, in the Costa Rican Claims Commission case of Ogden, Admr. (Moore, 1566), it was said :

In measuring the damages to be awarded, the commission has been advised to take the stand on the high ground of national indignity, of violated treaty, of breach of trust, of the oppression of a citizen of the nation by the rulers of another. But the commissioner for the United States, who could not ignore that the republic of Costa Rica, placed in jeopardy of its existence and making war for its defense, had no interest or wish to provoke by outrages the great and powerful republic of the United States, has adopted for damages an equitable measure.

330. In the Miliani case (Ven. Arb. of 1903, 754) the umpire said that he had not "discussed the suggestion that the claim, largely at least, was Italian in origin, and should be considered, even if not now Italian, because involving an infraction of international duty on the part of Venezuela toward Italy which would survive even change of citizenship on the part of the individual claimant. It is sufficient to observe that all the considerations for or against a claim which appeal to the diplomatic branch of a government have not necessarily a place before an international commission. For instance, unless specially charged, an international commission would scarcely measure in money an insult to the flag, while diplomatists might well do so. On the other hand, commissions have and exercise jurisdiction over contract claims, while the diplomatic branch of government, although usually reserving the right, rarely presses matters of this nature. While it remains true that an offense to a citizen is an offense to the nation, nevertheless the claimant before an international tribunal is ordinarily the nation on behalf of its citizen. Rarely ever the

nation can be said to have a right which survives when its citizen no longer belongs to it."

So in the Metzger case (Ven. Arb. of 1903, 578) the umpire said :

The German commissioner is of the opinion that this is not a claim between an individual and Venezuela, but "an international demand which the German Empire makes." In the opinion of the umpire this position is not maintainable. . . . The umpire . . . is of the opinion that the claim now before this commission is not a claim of the German nation but a claim of an individual.

#### PRESENTATION OF CLAIM DOES NOT BIND DEMANDING GOVERNMENT TO PROSECUTE

**331.** The presentation of a claim does not bind the government presenting it to insist upon it ; nor does reception amount to a recognition of its validity. Sir Edward Bruce, as arbitrator of the Colombian-American Commission, in the *La Constancia* and other cases (Moore, 2742) found it necessary to correct the ideas of certain claimants as to the effect upon the claim of its presentation by the one government or reception by the other. It was sought to remedy a jurisdictional defect by reference to the correspondence of the chargé d'affaires of the United States at Bogotá and to the proposed agreement entered into in the settlement of one claim. After discussing the habit of diplomatic agents, influenced by a natural feeling for their countrymen, to bring such cases to the attention of the government liable, and to lend their aid, he said :

But it is impossible to maintain that the mere presentation of a claim by a diplomatic agent binds his own government to insist upon it by all the means which on behalf of a claim recognized as valid and unobjectionable it is authorized to employ ; still less can the reception of these notes by the government to which they are addressed be construed into an admission of the validity of a claim, or into a waiver of any objections to it, that may exist on the ground of jurisdiction or otherwise.

So, as was said by Hassaurek, in the cases of the *Good Return* and the *Medea* (Moore, 2739), speaking for the Ecuadorian Commission :

I do not believe that the members of this commission are bound by what action their governments may have taken on former occasions in each individual case. If it were so, there would have been no need of establishing a mixed commission, instead of which the two governments should have referred these claims at once to the arbitration of a third party. Governments, like individuals, are not infallible, and if the government of the United States ever encouraged or adopted this claim, I have no doubt it would reconsider the view it then took of the question, if the case should again be submitted to its examination.

## ASSIGNMENT OF CLAIMS

**332.** Whether or not a claim may be assigned, and prosecuted by the assignee, we have more fully considered under the head of "Parties — Assignees." For the moment we shall content ourselves with an account of a rather curious instance. The Camy case (Boutwell's Report, 91; Moore, 2398) was heard upon defendant's demurrer, the memorial stating that the claimant had sold and assigned his claim on the proceeds of the cotton to the firm of Duthil & Faisans of New Orleans. The counsel for the United States insisted that such sale and assignment was legal, and that thereby the claimant ceased to have any title to the claim, and was not therefore entitled to present it and have an award. The claimant said in his memorial that he was advised that the assignment was null and void, but did not claim that the assignment was not made according to the agreement of the parties to it, or that it was void for fraud or other cause, insisting merely upon its legal invalidity. The assignees at the same time presented the claim. The commission said:

It is plain that there can be only one award for the claim. If Camy is legally entitled to it, Duthil & Faisans are not; if they are entitled to it, Camy is not. The grounds upon which the counsel for Camy claimed the right to recover are: (1) that the claim of Camy against the United States is not an assignable right; and (2) that by the statute of the United States all assignments of such claims, before allowance, are null and void. The convention under which we act is silent upon the question whether the original claimant may not assign his claim to another. The commissions heretofore established by treaty between the United States and other powers for the settlement of such claims have recognized the right of the original claimant to transfer his claim to another. The rules of the British and American, the Mexican, and the Spanish commissions recognized the right and required the transfer to be set forth in the memorial. The rules of this commission also recognized the right. Several cases of awards to assignees may be found among the decisions of the British and American Claims Commission. . . . It is urged that as the statute of the United States makes assignments void, that statute must operate to annul the assignment of Camy. We think that statute does not apply to the rights and claims of foreigners whose rights cannot come before any American tribunal for decision. That statute was made to prevent frauds upon the treasury. It cannot fairly be extended to affect the claims of foreigners coming before an international commission.

The demurrer was therefore sustained.

## TIME LIMIT CONTROLLING JURISDICTION OVER CLAIMS

**333.** The usual limit of time to which the jurisdiction of mixed commissions extends over claims applies to those originating before the date of the protocol, unless at least otherwise provided or indicated

by that document. Such was the language of Ralston, umpire, in the Massardo, Carbone & Co. case (Ven. Arb. of 1903, 706), wherein he found it the duty of the commission "to take jurisdiction over and grant judgment in all . . . cases originating at least before the date of the protocol, where the evidence and the rules of international law justify such action."

Similarly, Bainbridge, commissioner, in the Orinoco Steamship Co. case (Ven. Arb. of 1903, 72) found that "the key to such a jurisdictional question as that under consideration is the ownership of the claim by a citizen of the United States of America on the date the protocol was signed," and, the cause being referred to umpire Barge, he took the same view.

In the claim of the French Company of Venezuelan Railroads (Ralston's Report, French-Venezuelan Claims Commission of 1902, 367, 445), the umpire having been urged to accept a view which in his opinion would result in a claim or an award for damages arising from acts subsequent to the date of the commission, he held that such procedure would be "opposed to the terms of the convention. It would be an independent act posterior to the convention, and were this to be done by the umpire it would require the payment by Venezuela to the claimant company for damages in fact suffered in the United States of America at the hands of the umpire."

334. Under a differently worded protocol, the London Commission of 1853 found (Moore, 413) that it had jurisdiction of all claims "which may have been presented to either government for its intervention with the other" between December 24, 1815, and the expiration of the period prescribed by the convention for the presentation of claims to the commissioners; and by one of the standing rules of the commission it was declared that claims "presented to the commissioners by the agents of either government will be regarded as presented by their respective governments in accordance with the provisions of the convention." Under these circumstances the commission exercised jurisdiction without regard to the fact that the claim had or had not been presented by one government to the other.

335. A different but a very simple question was presented in the Matchett case before the United States and Venezuelan Claims Commission of 1889, formed for the purpose of revising the judgments of the commission of 1866. In this case it was said (Report of Commission, 6) that "the language of this article is as follows: 'All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the government of Venezuela which may have

been presented to their government or its legation at Caracas before the first day of August, 1868, and which, by the terms of the afore-said convention of April 25, 1866, were proper to be presented to the mixed commission recognized under said convention, shall be submitted to a new commission.' It would seem too plain for argument that this commission, which is the new one mentioned in this article, has no authority to entertain the consideration of a claim arising after the date mentioned, for the simple reason that no such claim could lawfully be submitted for its consideration."

#### CONTROL OVER CLAIMS

**336.** While it is true that claims presented by one government to another inure to the benefit of individuals interested in their prosecution, it is not true that, when they are so presented, control over them rests with such individual. The right of a state to bargain away the rights of the individual citizens has been treated as absolute. From an examination of treaties we discover that nations may, at least have the power to, release all claims of their citizens arising under a certain state of facts, as was done as to the Alabama Claims; that they agree by treaty to appropriate a lump sum, to satisfy all claims of their citizens, as in the case of the treaty between the United States and Spain of 1819, purchasing Florida; that, in exchange for a release from onerous treaty provisions, they may undertake to assume responsibility for acts of the other party to the treaty, releasing the claims of their citizens against such other party, as in the case of the French Spoliations; that at the conclusion of a war the successful party may release the defeated one from its international liabilities towards the citizens of the first, as in the treaty of Guadalupe Hidalgo between the United States and Mexico and the treaty of Paris of 1898 between Spain and the United States.

**337.** It is a recognized rule that, once assuming the conduct and management of the claim of a national, laws of international propriety forbid that the opposing nation should treat with the national of the claimant nation who is seeking redress. This rule, and the foundation for it, has received some recognition from commissions; for instance, in the Fabiani case (Ralston's Report, French-Venezuelan Mixed Claims Commission of 1902, 81, 132), Plumley, umpire, said:

When France intervened in behalf of her national, the claims of Fabiani were no longer individual and private claims; they became national. The right to intervene exists in the indignity to France through her national. Thenceforward it is national interests, not private interests, that are to be safeguarded. It is the

national honor which is to be sustained. It is the national welfare also which must be considered. In protecting Fabiani and his interests, the general welfare must be kept in the foreground. To the extent that his interests and the common welfare of France are in accord his particular claims can be pressed, but no further. If at any time the general good of France requires a surrender of all his claims, such surrender it is expected France will make, and after that if Fabiani has a claim it is against his own government, not against Venezuela.

**338.** The same principle was followed in the very important case of McLeod before the British-American Commission of 1853 (Report, 314; Moore, 2419). Mr. Hornby, the British commissioner, thought that the adjustment of the national phase of the matter did not affect the claim of McLeod for arrest and imprisonment growing out of the charge of murder committed at the destruction of the steamer *Caroline* during the Canadian insurrection, and insisted that any claim on the part of McLeod for damages should be considered as one of the unsettled questions existing at the date of the convention. Mr. Upham, American commissioner, on the other hand, contended (Report, 320) :

A settlement by the governments of the ground of international controversy between them *ipso facto* settles any claims of individuals arising under such controversies against the government of the other country, unless they are specially excepted ; as each government by so doing assumes, as principal, the adjustment of the claims of its own citizens, and becomes, itself, solely responsible for them.

On reference to the umpire, he said (Report, 327 ; Moore, 2424) :

This case arose out of the burning and destruction of the American steam-boat *Caroline* at Schlosser, in the state of New York, on the Niagara River, by an armed force from Canada, in the year 1837, for which the British government appears to have delayed formally answering the claims of the United States until 1840, when the claimant was arrested by the authorities of the state of New York on a charge of murder and arson, as having been one of the party which destroyed the *Caroline*. The British government then assumed the responsibility of the act, as done by order of the government authorities in Canada, and pleaded justification on the ground of urgent necessity. From this time the case of the claimant became a political question between the two governments, and the United States used every means in their power to insure the safety of the claimant, and to procure his discharge, which was effected after considerable delay. It appears by the diplomatic correspondence that the affair of the *Caroline*, the death of Durfee, who was killed in the affray, and the arrest of the claimant, were all amicably and finally settled by the diplomatic agents of the two governments in 1841 and 1842. The question, in my judgment, having been so settled, ought not now to be brought before this commission as a private claim. I therefore reject it.

In a private instance, that of the Houard case, a dispute had arisen between the United States and Spain out of the court-martial of Houard for treason as a Spanish subject, and his sentence to eight years' imprisonment, with confiscation of his property. A diplomatic

settlement had been made by virtue of which Houard, claimed by the United States to be an American citizen, was pardoned, released, and his property restored. Baron Blanc, as umpire of the Spanish Commission (Moore, 2420), said :

The umpire does not deem it consistent with the character of his office, nor required by the interests of either party, that the questions involved in the sentence, thus disposed of heretofore and intended to be closed by a conditional pardon granted as the result of an international agreement, should now be reopened. With this view of the case, it is unnecessary to determine whether or not the alleged loss of claimant's nationality of origin by expatriation is sustained.

**339.** The right of the submitting government to withdraw claims presented by it has usually been recognized without question. This was often the case before the commissions sitting at Caracas, and no application for leave to withdraw was passed upon formally by commission or umpire. Before the British-American Claims Commission, as we find from Hale's Report, 61, one claim at least was withdrawn by the British agent under leave from the commission. An obtention of formal permission so to do would represent undoubtedly more regular practice.

But even the appointment of a special commission to adjudicate claims between two governments does not deprive them of the power of outside settlement, for, as was held by Sir Edward Bruce in the Colombian Bond cases (Moore, 3614) :

The high contracting parties in substituting for themselves a special tribunal for the settlement of certain matters at issue between them, do not thereby divest themselves of their power to treat directly and in the ordinary manner all questions which are not expressly submitted to the commission so substituted in their stead.

#### INFORMAL PRESENTATION BY GOVERNMENT

**340.** While, usually, claims have been presented before commissions in due form by way of petition or memorial of the interested party, yet strict rules of practice are often departed from, the commission taking jurisdiction where the right to recovery of a citizen or subject of the demanding nation was made to appear even by informal documents. Notably was this the case in the instance of the heirs of Jules Brun, French-Venezuelan Claims Commission under the treaty of 1902 (Ralston's Report, 5, 28), where the French government, the real party in interest not being before the commission, asked for relief, the party entitled to such relief having requested governmental action. Umpire Plumley held that although the claim was informally before him, the claimant would "be estopped from any future right or claim

against the respondent government on account of the death of her son as fully and as completely as though she had appeared earlier in the case; and the respondent government will be protected and the claimant government barred as effectually in every particular as though matters had proceeded more precisely and more formally."

#### UMPIRE THORNTON'S VIEW OF MEANING OF WORD "INJURY"

**341.** In the Pradel case (Moore, 3423), Thornton, umpire, in dismissing, said that there was no proof that the claimant availed himself of his right to present his claim to the Mexican government, or that, if he did so, he was refused payment. It could not be maintained that an injury had been done to the claimant until the Mexican government had been made aware of the debt and refused to cancel it. In that case, he said, there could be no excuse for the failure, since the claimant lived almost at the gates of the city of Mexico, and could have presented his claim in person. If he had lived in a remote part of the country, he continued, distant from any authorities to whom an appeal could be made, there might be some excuse for his omission; but in fact he was perfectly conversant with the language, and was married to a Mexican woman, and had resided in the country for many years. The claim was for forced contributions of various supplies taken by the Republican army during its siege of the city of Mexico.

A similar situation frequently arose before the Venezuelan commissions, and as well before many other like bodies, but we are not able to refer to another case where the umpire took the view expressed by Sir Edward Thornton, who appears to have been governed by his understanding of the word "injury" as used in the protocol under which he acted, and as more at large discussed under the heading of "Commissions — Denial of Justice."



## CHAPTER IX

### DAMAGES

**342.** We cannot do better, in commencing the consideration of the subject of damages, than to refer to the action of the Geneva Commission, to which were referred the Alabama and other claims. It will be remembered that in the very opening of its proceedings the tribunal was threatened with absolute failure because of the claims submitted by the United States for consequential and indirect damages, to which the British government objected as not within the scope of the submission. Delays were had in the hope of an adjustment between the two governments, but the difficulties were relieved by the tribunal itself making the following statement (Foreign Relations of 1872, Part II, Vol. IV, 19):

The application of the agent of Her Britannic Majesty's government being now before the arbitrators, the president of the tribunal (Count Sclopis) proposes to make the following communication on the part of the arbitrators to the parties interested:

The arbitrators wish it to be understood that in the observations which they are about to make they have in view solely the application of the agent of Her Britannic Majesty's government, which is now before them, for an adjournment, which might be prolonged till the month of February in next year; and the motives for that application, viz., the difference of opinion which exists between Her Britannic Majesty's government and the government of the United States as to the competency of the tribunal, under the Treaty of Washington, to deal with the claims advanced in the case of the United States in respect of losses under the several heads of — 1st, "the losses in the transfer of the American commercial marine to the British flag"; 2d, "the enhanced payments of insurance"; and 3d, "the prolongation of the war, and the addition of a large sum to the cost of the war and the suppression of the rebellion"; and the hope which Her Britannic Majesty's government does not abandon, that if sufficient time were given for that purpose, a solution of the difficulty which has thus arisen, by the negotiation of a supplementary convention between the two governments, might be found practicable.

The arbitrators do not propose to express or imply any opinion upon the point thus in difference between the two governments as to the interpretation or effect of the treaty; but it seems to them obvious that the substantial object of the adjournment must be to give the two governments an opportunity of determining whether the claims in question shall or shall not be submitted to the decision of the arbitrators, and that any difference between the two governments on this point may make the adjournment unproductive of any useful effect, and, after a delay

of many months, during which both nations may be kept in a state of painful suspense, may end in a result which, it is to be presumed, both governments would equally deplore, that of making this arbitration wholly abortive. This being so, the arbitrators think it right to state that, after the most careful perusal of all that has been urged on the part of the government of the United States in respect of these claims, they have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the tribunal in making its award, even if there were no disagreement between the two governments as to the competency of the tribunal to decide thereon.

With a view to the settlement of the other claims to the consideration of which by the tribunal no exception has been taken on the part of Her Britannic Majesty's government, the arbitrators have thought it desirable to lay before the parties this expression of the views they have formed upon the question of public law involved, in order that after this declaration by the tribunal it may be considered by the government of the United States whether any course can be adopted respecting the first-mentioned claims which would relieve the tribunal from the necessity of deciding upon the present application of Her Britannic Majesty's government.

The question of allowance of damages consequential in their nature has received much consideration at the hands of other commissions.

In the Rice case, Lieber, umpire (Moore, 3248), said :

As to the portion of the damages claimed which may be imagined to arise out of consequential damages, the umpire desires to lay down as one of the requisites for consequential damages, that there must be a manifest wrong, the effect of which prevents the direct and habitual lawful pursuit of gain, or the fairly certain profit of the injured person, or the profit of an enterprise judiciously planned, according to custom and business. A mere device of speculation, however probable its success would have been or may appear to the projector, cannot enter into the calculation of consequential damages. The umpire finds it impossible to say what the loss or profits may have been to claimant, if there were any, for he cannot find out whether claimant pursued any distinct line of business.

Dr. Lieber's successor, Sir Edward Thornton, in the Hammaken case (Moore, 3471) said :

The umpire has always been opposed to consequential damages, and thinks they ought never to be taken into consideration. It is impossible to measure them with any approach to justice; they are of an uncertain and imaginative nature, particularly in a country where the rate of interest is so high, and where the chances of losing both capital and interest are quite as great as those of the realization of an immense capital. The certainty of a smaller interest upon the compensation allowed is much more substantial than imaginary consequential gains.

**343.** In the Rudloff case, Bainbridge, commissioner, speaking for the commission (Ven. Arb. of 1903, 182, 198), said :

Damages to be recoverable must be shown with a reasonable degree of certainty, and cannot be recovered for an uncertain loss. All that the claimants pretend to prove here, or indeed that from the nature of the case, it is possible for them to prove, is that their predecessor in interest might have obtained the income claimed if the government had not broken the contract. They are necessarily unable to prove with reasonable certainty that he could or would have obtained it. The case presented here is not that of the loss of the prospective profits of an established business, nor is it that of the loss of the ascertained profits derivable from a contract unperformed. It is simply that of the loss of the expected profits of a business venture, wrongfully prevented of fulfillment by the defendant government, and for these expected profits the claimants cannot recover, because they are wholly unable to show that a profit would have been made.

The same commissioner, speaking for the commission, in the Dix case (Ven. Arb. of 1903, 7) laid down in a few words the true rule:

Governments like individuals are responsible only for the proximate and natural consequences of their acts. International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure.

**344.** In addition to the authorities already quoted as to consequential damages, involving in a large degree the element of possible loss in business transactions, we refer to the Roberts case (Ven. Arb. of 1903, 142), wherein it was said: "The derangement of Mr. Quirk's plans, the interference with his favorable prospects, his loss of credit and business, are all proper elements to be considered in the compensation to be allowed for the injury he sustained." (We shall discuss later the question of compensation for loss of credit.) In the De Caro case (Ven. Arb. of 1903, 810) the umpire rejected a claim for average business profits during the months of a blockade, holding that, to accept such a claim, he would be compelled to ignore the fact that during a large part of a noneffective blockade there was continuous fighting about the location where the business was carried on, and that "to assume business profits for such a period at all analogous to those obtained during the time of business quiet, would be to grossly violate the probabilities of the situation. It is not to be supposed that during a period of destitution, plundering, and destruction of all sorts, De Caro would have successfully carried on any business whatsoever."

In the Baldwin case (Moore, 2864), wherein it was sought to obtain redress for loss of business profits, the umpire deemed it "necessary especially to examine whether, according to the principles of Mexican law, damages in respect of a profit of which the injured individual has been deprived comprise only that which follows the injury directly and immediately."

**345.** The Venezuelan commissions, wherein the view already expressed was entertained, had in mind always the language of the Alabama Commission, holding that "prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies" (Moore, 658).

**346.** In the Salvador case (Foreign Relations of 1902, 872) the majority of the commission held that "under the terms of the protocol and by the accepted rules of international courts in such cases, nothing can be allowed as damages which has for its basis the probable future profits of the undertaking thus summarily brought to an end," but that "on the clear and certain evidence before us, without involving ourselves in speculation, but computable on the uncontradicted and direct evidence presented, we find the value of the franchise, computed without reference to future or speculative profits or any speculative or imaginary basis whatever, to be \$750,000."

In the Martini case, which had reference, however, to mines, umpire Ralston said (Ven. Arb. of 1903, 819, 843):

It is the opinion of the umpire, several times expressed, that Venezuela is not to be held responsible for speculative profits, but the profits in the present case are not entirely speculative. In a question of contract presented to the Supreme Court of the United States, in *Howard vs. Stillwell Tool Manufacturing Co.* (139 U. S., 199), it was said: "It is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness; or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into." While this language is not absolutely in point, it indicates that if a clear measure of damages exists with relation to future business, it may be invoked.

**347.** In the Mora & Arango case the Spanish authorities had embargoed the business of the claimant in one of the towns of Cuba, and, damages being sought, Lewenhaupt, umpire, said (Moore, 3783):

It does not seem that any similar case has been decided by the commission; but it is usual in such cases to award indemnity for prospective earnings. The loss is, however, in the present case, of a very speculative character, as depending upon most uncertain contingencies, and therefore the only allowance made is the sum of \$3225 in the nature of interest on the capital of the firm, which is stated in the record to have been \$184,300.

In the Cauty case (Hale's Report, 85; Moore, 3309) an allowance of \$15,700 was made for about three months' wrongful imprisonment

and injury to business, but damages were refused in the Grant case (Hale's Report, 162) for destruction of business incident to war.

**348.** In the Poggioli case (Ven. Arb. of 1903, 847) an award was asked for the loss of coffee crops during three years of the enforced abandonment of claimant's plantations. The umpire held as follows :

This loss was the direct result of the actions of the agents of the government, joined with those of unpunished malefactors, and for which the government was responsible, and is not at all to be classed as indirect; the umpire adhering to the rule in this respect laid down by him in the Martini case [Ven. Arb. of 1903, 819]; no suggestion being made that considerable crops were not or could not have been made during the time in question.

In the Cheek case against Siam (Moore, 5072) the average yearly yield of logs was held to furnish a measure of damages.

In the Valentiner case, however, Duffield, umpire (Ven. Arb. of 1903, 562), held that damages could not be recovered under the special circumstances, because they were too remote. The laborers had been taken away by an enforced draft, their absence resulting in the loss of the crop, and this opinion was referred to by him in the Plan-tagen Gesellschaft case (Ibid., 631) as justifying his conclusion in the latter case. The authorities cited by him, however, are scarcely sufficient to justify an extreme rule of nonliability, and are those of state courts.

The subject is referred to in the Roberts case (Ven. Arb. of 1903, 142), wherein Bainbridge, commissioner, said that it appeared "that on the date of the injury, the principal part of the crop of 1871 had been taken off and preparations were then making for the second crop. An allowance of two thousand pesos is believed to be a reasonable valuation of Mr. Quirk's share in the profits of the crop," and this was granted.

**349.** In the Martini case, before the Italian-Venezuelan Commission (Ven. Arb. of 1903, 819), the conduct of the officials of the Venezuelan government and of the government itself had been such as to render impossible the workings of important mines near Guanta, a practical embargo having been put upon the exportation of the product of the mines, and the laborers driven off. At the time of these occurrences there existed a contract between the mine owners and others for the sale of their product up to a certain amount, thus establishing an assured market, with a reasonably well-established profit, of all of which the government had been notified in advance. The umpire held that, with suitable deductions because of disturbed conditions, a proper allowance should be made for the losses. An

apparently different view in a somewhat similar case was expressed by umpire Duffield (Orinoco Asphalt Co. case, Ven. Arb. of 1903, 586), he holding that "a fair, and perhaps the only, measure of damage is interest on the amount for which the product of the mine would have sold during the period of stoppage of traffic." The two cases may perhaps be reconciled by consideration of the fact that the concession for the mine in the Martini case was for a comparatively limited period, the extent of ownership or control given the Orinoco Asphalt Co. case not, however, appearing.

350. In the Rudloff case (Ven. Arb. of 1903, 182, 198), a claim for loss of credit being made, Bainbridge, commissioner, the Venezuelan commissioner joining in the result, said: "The claim for 'loss of credit' is not supported by sufficient evidence, and indeed the damages alleged in that respect, as involving the intervention of the will of the other parties, are too remote and consequential." Similarly in the Poggioli case (Ven. Arb. of 1903, 847) the umpire said: "It is strenuously urged that an allowance should be made for the loss of credit to which the Poggiolis were subjected, but this item is entirely too indefinite and uncertain to be taken into consideration by the umpire." We have already cited the Roberts case (Ven. Arb. of 1903, 144), wherein Bainbridge, umpire, speaking for the commission, held, however, that loss of credit and of business, with other relevant circumstances, were proper elements to be considered in the compensation to be allowed for the injury sustained. The circumstances were exceptional, and brought about practically the ruin of plaintiff's intestate.

#### FREIGHTS

351. In different ways the question of allowance for freights came before the Geneva Tribunal. It decided (Moore, 658) that prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies; and again, when the question of gross freights was under consideration, it was held (Moore, 658) that all claims for gross freights, so far as they exceed net freights, should be set aside.

In the case of the *Canada*, between the United States and Brazil, Thornton, arbitrator (Moore, 1746), said: "The undersigned can in no case admit a right to prospective profits; for the ship and the whole capital might have been lost early in the voyage, or the expedition might have been entirely unsuccessful and without profit."

352. Commenting upon the above-cited decisions of the Geneva Tribunal as to prospective earnings, Commissioner Frazer, in his opinion in the *Boyne*, *Monmouth*, and *Hilja* cases (Hale's Report, 252), said :

The allowance of prospective earnings by vessels was denied by the tribunal at Geneva unanimously. It is not, so far as I am aware, allowed by the municipal law of any civilized nation anywhere. The reason is obvious and universally recognized among jurists. It is not possible to ascertain such earnings with any approximation to certainty. There are a thousand unknown contingencies, the happening of any of which will render incorrect any estimate of them, and hence result in injustice. Who can say that the *Monmouth* would have reached Savannah at all ; that she could have procured a cargo of cotton at  $\frac{3}{4}$  d. per pound, the lowest freight in proof ? Who can say that she would have got better or as good rates as that ? Why could she have done better ? There is no reason. Who can say that she could have been laden and sailed before the blockade would have stopped her ? The witnesses do not say so, but only " if she had met no detention or accident." Can this commission say so ? It is palpable that we can only conjecture, and conjecture is no fit basis for an award of damages. We should have had evidence more satisfactory from the claimant, such as the prevailing rate of charter of such a vessel at the time and place. Under such circumstances we are left to estimate the value of the vessel for return cargo upon very unsatisfactory evidence. I base my estimate upon cotton freight at  $\frac{3}{4}$  d. per pound, because there is, in my judgment, a greater probability, in view of all contingencies, that this is above rather than below a just estimate.

The *Boyne* had sailed from England with a cargo of coal for Savannah, was boarded near the entrance of the harbor of Charleston by a navy officer who entered upon her registry a warning off the whole coast of the South, and in consequence she abandoned her voyage to Savannah and went to New York, where it was alleged that she disposed of her cargo of coal at a rate much less than it would have commanded in Savannah, and took a homeward freight from New York of smaller value than she would have secured from Savannah. At the date of the warning, no sufficient blockade had been instituted at Savannah or any other port south of Charleston, the actual blockade of Savannah not having commenced until more than two weeks later. The essential facts as to the *Monmouth* were similar. As to the *Hilja* there were qualifying facts affecting the right of the claimant to recovery. In the case of the *Boyne* the commission agreed upon a considerable award, and the majority, Commissioner Frazer dissenting as to the amount, made a large award for the *Monmouth*, while the *Hilja* case was disallowed, the English commissioner dissenting.

In the case of the *Masonic* (Moore, 1066), Baron Blanc, umpire, stated that the Spanish government had recognized in principle the admissibility of proofs of ordinary and reasonable earnings of a vessel in good condition and ready to go to sea, and awarded accordingly. The umpire in the case of the *Colonel Lloyd Aspinwall* (Moore, 1014) adopted the same principle.

#### PRESUMPTION AS TO AMOUNT OF DAMAGE IN FAVOR OF CLAIMANT

**353.** In the *Orr & Laubenheimer* case (Foreign Relations of 1900, 826) the arbitrator between the United States and Nicaragua said that where property had been taken for the public welfare "it seems to me right that the benefit of doubt should be thrown in favor of the individual, and that his damages should be liberally estimated, lest by any error he should be oppressed."

#### DAMAGES IN CONTRACT CASES

**354.** While many cases of damages consequent upon interference with the operation of contracts between the government and cessionaires have received consideration of commissions, the number of cases where the contracts have been entirely broken, or rendered impossible of performance, are comparatively few in number, and the measure of damages therefor has consequently rarely received consideration.

In the *Orinoco* case, French-Venezuelan Claims Commission under the treaty of 1902 (Ralston's Report, 244), the subject was examined. Plumley, umpire, said on page 365 :

What were the damages suffered by the claimant company because of the injury it received through the action of the respondent government in reference to the contract with the British company? These damages were substantially the value of the concession at that time. There are minor matters which if definitely known in character, amount, and value, might be considered, reckoned with, and deducted from this sum, but they are left all too vague to be of evidential value, and hence they are omitted from consideration. Approximate equity is all that can be required and all that can be gained from a case so indefinite in many of its important facts. Substantially the property of the company was dispersed and disposed of to its entire loss, though its inability was not through any inherent weakness of its own, but resulted from the conditions which environed it. In 1890, it was in a situation to be relieved of its indebtedness through aid of the British company. The sovereign act of the respondent government prevented this. There is no inequity if that government be asked to take up the load just as it was when this act of sovereignty was interposed. The value of the concession may certainly be regarded as equivalent to the sum which the British company was about to pay for it.



**355.** The Oliva case (Ven. Arb. of 1903, 771) was one for the cancellation and destruction of a concession of the right to establish a cemetery in the neighborhood of Caracas. In this case the claimant government presented elaborate calculations as to the probable number of deaths in Caracas during the period of the concession, the number which would have been interred within the Pantheon, and the profits to arise from each sepulcher. The umpire rejected this method of computation, because the concession was not exclusive, and because the number of such interments and the possible profits on each interment were so absolutely uncertain that they could not be accepted as a basis of calculation in an ordinary civil tribunal, much less in an international one. It was maintained, however, that Venezuela, although she might possess the power to break the contract, was obliged to pay the damages resultant upon such action, and the umpire concluded that in this case, and referring only to the particular facts involved in it, the value of the contract was the amount expended to obtain it, plus a reasonable sum for the time lost by the claimant in connection therewith, and for these expenses he made a liberal allowance.

In the Oliva case, cited *supra*, the umpire was asked to allow the loss to which it was said Oliva was subjected because of being compelled to dispose of his stock of goods in Havana at a reduced price to enable him to go to Caracas and enter upon the cemetery concession which was virtually abrogated. He said :

So many elements enter into a matter of this sort that the umpire cannot accede to this suggestion. The goods may have been sold at a reduced price, because of a failing market, because of their age, or for other reasons he is incapable of appreciating, all the surroundings not being presented to him. He would not be justified in charging this loss, therefore, against Venezuela, even were it otherwise proper, with relation to which he expresses no opinion.

#### DAMAGES FOR TORTS

**356.** In the Poggioli case (Ven. Arb. of 1903, 847) a large claim was presented because of threats of violence which were made against agents and debtors unless they should refuse to pay their debts to claimants, and the umpire said that "for the destruction of the properties involved in this situation, a sufficient award is made, but no award will be made for the refusal to pay the debts ; the reason being that the debts might have been collected at a subsequent period, together at least with interest on them, which would measurably at any

rate offset the important temporary loss to the Poggiolis. Aside from this, however, the loss is too indirect and uncertain."

In the Seth Driggs case (United States and Venezuelan Claims Commission of 1889, 405) the commission regarded the particular showing made as too speculative in character to offer any just measure of damages.

In the Dix case (Ven. Arb. of 1903, 7) the claimant, having sold property for less than its value during a revolutionary period, sought to hold the government responsible therefor; but Bainbridge, commissioner, speaking for the commission, and finding in the record "no evidence of any duress or constraint on the part of the military authorities to compel him to sell his remaining cattle to third parties at an inadequate price," held that this item was too remote to entitle the claimant to compensation.

**357.** Although the item of loss of employment may be regarded as consequential in its nature when resultant upon the act of the respondent government, it has, at least in one case, not been regarded as too remote or indirect to receive the consideration of the commission. In the Gahagan case (Moore, 3240) the commissioners, under the convention between the United States and Mexico of 1839, allowed "for loss of his employment and expenses resulting therefrom, the sum of \$6000."

**358.** In the Atwood case before the Mexican-American Commission of 1868 (Moore, 3249) the claimant had endeavored in 1857 to export from Mexico a lot of live stock, including some mares. At the time, the exportation of mares was forbidden by law, and in consequence claimant was on several occasions detained by the authorities, though finally by some arrangement with them permitted to pass with all the animals into Texas. The commissioners held that he could not make a claim for detention, as the business in which he was engaged was illegal and the arrangement finally made with the authorities, whatever it was, unlawful.

**359.** In the Ferrer case, Mexican-American Claims Commission of 1868 (Moore, 2721), the commissioners awarded the value of the merchandise at the place of its shipment, the cost of its transportation, and 10 per cent profit on the value, according to the practice of prize courts.

In the Monnot case (Ven. Arb. of 1903, 170) the commissioners held that the claimant was entitled to compensation for the proximate and direct consequences of the wrongful seizure of his property, citing approvingly the case of *Smith vs. Mexico*, decided by the United

States and Mexican Commission of 1839 (Moore, 3374), wherein an award was made for the value of property lost or destroyed pending judicial proceedings, with a reasonable mercantile profit thereon.

In the Bronner case, Thornton, umpire (Moore, 3134), allowed the original value of the goods, with the cost of freight, landing, etc., but did not take into consideration the profit upon the sale of the goods, thinking that the loss of this was sufficiently compensated for by the assured interest of 6 per cent per annum at the end of a number of years.

In the Barque *Jones* case, the claim being for the loss of a vessel, the rule applicable in fact under all circumstances was laid down by Upham, commissioner (United States and Great Britain Claims Commission of 1853, 84, 92; Moore, 3049), as follows: "The lowest rule of damages for the seizure of a vessel without probable cause, or color of right, is full compensation for all injury incurred."

In the case of the San Pablo Nitrate Company before the Anglo-Chilean Commission (Reclamaciones Presentadas al Tribunal Anglo-Chileno, Vol. II, 38), it was held that the value of certain articles taken was not the temporary price at Iquique because of interruption of traffic, but the ordinary commercial value in that vicinity.

Under this heading we have designed to refer rather to the measure of, than to the right to, damages in contract cases.

#### REAL ESTATE

**360.** The rule as to the measure of damages for the taking or destruction of real estate was held to be not the expected loss of a business venture wrongfully prevented of fulfillment by the defendant government (Rudloff case, Bainbridge's Opinion, Ven. Arb. of 1903, 182, 198), but the value of its use (the rental value), it being recognized, however, that it had been held by respectable authority that when the defendant destroyed a building in course of construction by the plaintiff, the prospective profits which the plaintiff might have made by renting the building were not recoverable.

#### MEASURE OF DAMAGES IN CASE OF DEATH

**361.** In two cases the measure of damages to be allowed for death, responsibility being determined, has received considerable discussion. The first is the Di Caro case (Ven. Arb. of 1903, 769), in which Ralston, umpire, after rejecting the rule asked for by the Venezuelan

commissioner, which was based upon the decedent's expectation of life, coupled with his earnings, as a complete statement of the measure of damages, said :

But while in establishing the extent of the loss to a wife resultant upon the death of a husband it is fair and proper to estimate his earning power, his expectation of life, and, as suggested, also to bear in mind his station in life with the view of determining the extent of comforts and amenities of which the wife has been the loser, we would, in the umpire's opinion, seriously err if we ignored the deprivation of personal companionship and cherished associations consequent upon the loss of a husband or wife unexpectedly taken away. Nor can we overlook the strain and shock incident to such violent severing of old relations. For all this no human standard of measurement exists, since affection, devotion and companionship may not be translated into any certain or ascertainable number of bolivars or pounds sterling. Bearing in mind, however, the elements admitted by the honorable commissioners as entering into the calculation and the additional elements referred to, considering the distressing experiences immediately preceding this tragedy, and not ignoring the precedents of other tribunals and of international settlements for violent deaths, it seems to the umpire that an award of fifty thousand bolivars [\$9500] would be just.

As indicated, the award in the above-mentioned case was in favor of the wife for the death of her husband.

In the Brun case (Ralston's Report, French-Venezuelan Mixed Claims Commission of 1902, 5) the claim was for compensation to the mother for the loss of a son, and Plumley, umpire, said :

In the opinion of the umpire it [the amount to be assessed against the respondent government] is such an amount as will meet the pecuniary loss which the widowed mother has sustained through the death of her son. This is not the sum which put at interest would earn an amount equal to his annual wage. It is only her fair expectancy in his wage and from his accumulations, which, had he lived, would reach her from year to year. In the absence of all proof that he had accumulated aught, or that he had contributed anything to her comfort or support, there is for the umpire no rule of action but to assume the ordinary conditions as to accumulations and the ordinary willingness of a dutiful son to contribute generously to the comfort and happiness of his widowed mother in her declining years, where as in this case the deceased had no dependent family. Her age is not stated, but to be the mother of one born forty-five years since, she is a woman near threescore years and ten, and her expectation of life is relatively short.

**362.** For actions on the part of officials of the respondent governments resulting in death there was allowed : by the Mexican Commission of 1868, \$50,000 in the Conrow case (Moore, 3005), \$40,000 in the Standish case (Ibid.), \$50,000 in the Parsons case (Ibid.), \$12,000 in the Donoughho case (Moore, 3014), \$20,000 for murder of husband and son, with some evidence of robbery of their bodies, in the Glenn case (Moore, 3138); \$60,000 by Baron Blanc in the

Portuondo case, before the Spanish Commission (Moore, 3007); about \$20,000 for the death of a steamship captain caused by the discharge of artillery upon his vessel, in the Meling case before the Swedish-Venezuelan Commission (Ven. Arb. of 1903, 954); about \$9500 in the Di Caro case (Ven. Arb. of 1903, 769) and about \$8000 in the Cesarino case (Ven. Arb. of 1903, 770), both before the Italian-Venezuelan Commission; 100,000 francs for the death of Brun, by the French-Venezuelan Commission of 1902 (Ralston's Report, 5). In the case of Madsen and Jespersen, owners of the steamer *Jotun* (Ven. Arb. of 1903, 954), an allowance of about \$340 was made to them for damages caused by the death of Meling, its captain, but an award was refused (Ibid.) to the Ydun Life Insurance Company which had paid a policy upon his life to his widow.

#### DAMAGES FOR ILLEGAL IMPRISONMENT

**363.** One of the most frequent complaints before commissions has been because of the unjust detention and imprisonment of the claimant. In cases of this sort where the respondent government has been found liable, awards have varied in amount dependent upon the physical or moral hardship connected with the imprisonment, its duration, the station in life of the person offended against, the incidental injury to or destruction of his business (although the latter would seem rather consequential than direct), and other special circumstances. The range of awards imposed is shown by the following examples: \$100 for two and one half hours, Gage case (Ven. Arb. of 1903, 164); \$250 for four hours, Torrey case (Ibid., 162); \$100 for eight hours, Crowther case (Hale's Report, 81; Moore, 3304); 250 bolivars (about \$50) a day, Poggioli case (Ven. Arb. of 1903, 847); \$500 for detention not of long duration and menaces to compel payment of forced loan, Rose case (Moore, 3421); \$500 for one day, Hicks case (Moore, 3422); \$1540 for two and one half days, with some loss of money and wearing apparel, etc., Monroe case (Moore, 3300); \$5000 with 6 per cent interest, for four months, Sartori case (Moore, 3124); \$5000 for three days, with notice to leave Cuba, Machado case (Moore, 3274); \$15,700 for nearly three months' imprisonment and injury to business, Cauty case (Hale's Report, 85; Moore, 3309); \$1000 for three or four days, Montgomery case (Moore, 3272); 6000 Peruvian soles for three days' imprisonment, without food or medical attendance, and exposure to dangers, Hill case (Moore, 1655); £400 for five days' imprisonment, with suffering and loss of employment, Bovallins case

(Ven. Arb. of 1903, 952); £400 for eight days' imprisonment, coupled with sickness, loss of cash and personal effects, Bovallins and Hedlund case (Ven. Arb. of 1903, 952); \$930 for eight days, Levy case (Hale's Report, 66; Moore, 3285); \$500 for ten days, Griffin case (Moore, 3252); \$1100 for eleven days and order to quit Cuba, San Pedro case (Moore, 2569); \$1437 for thirteen days without trial, McKeown case (Hale's Report, 87; Moore, 3311); \$1540 for fourteen weeks, with discharge without trial, Smith case (Hale's Report, 86; Moore, 3310); \$3000 for sixteen days without trial, Molière case (Moore, 3252); \$5160 for seventeen days, Patrick case (Hale's Report, 68; Moore, 3287); \$6000 for twenty days, Casanova case (Moore, 3277); \$5380 for five weeks' imprisonment and other damages, Stovin case (Hale's Report, 64; Moore, 3283); \$300 each to seamen for about three weeks, Whaling Claims case (Foreign Relations of 1902, Appendix I, 463); \$600 for twenty-five days' imprisonment and detention, Williams case (Moore, 3119); \$500 for thirty days' imprisonment, Fritot case (Moore, 3271); \$500 for thirty-one days, because of excessive bail required, Jones case (Moore, 3254); \$10,000 for thirty-five days' imprisonment, with harsh treatment, Alfred Le More case (Boutwell's Report, 94; Moore, 3311); \$4000 for thirty-five days' imprisonment, without special circumstances of harshness, J. Le More case (Boutwell's Report, 94; Moore, 3311); 10,000 bolivars (about \$2000) for thirty-seven days, Rogé case (Ven. Arb. of 1903, 497); \$3900 for thirty-nine days, Montejo case (Moore, 3277); \$500 for five or six weeks, Carmody case (Hale's Report, 67; Moore, 3287); \$4000 for forty days, Powers case (Moore, 3274); \$5000 for forty-one days, with some loss of effects, Edwards case (Moore, 3268); \$5390 for seven weeks and three days, Binney case (Hale's Report, 64; Moore, 3282); \$3000 for fifty-five days, De Luna case (Moore, 3276); \$5100 for sixty days, Barnes case (Moore, 3247); \$775 for sixty-nine days, virtually of enforced detention, Stott case (Hale's Report, 66; Moore, 3286); \$30,204 for eighty-one days, with loss of employment, Shaver case (Hale's Report, 66; Moore, 3285); \$20,000 for eighty-four days and outrageous treatment and placing in stocks, Baldwin case (Moore, 3240); \$1200 for one hundred and seven days, Pratt case (Hale's Report, 63; Moore, 3280); \$6000 for three months and four days, Ashton case (Hale's Report, 69; Moore, 3288); \$800 for about four months, Riley case, (Hale's Report, 74; Moore, 3295); \$1600 for four months beyond proper time, Halstead case (4 Moore, 3244); \$4800 for four months' excessive imprisonment, unreasonable detention, Parr case (Hale's

Report, 80; Moore, 3302); \$14,000 for arrest and detention of one hundred and forty days, with special hardships, Rozas case (Moore, 3124); \$3000 for six months, Cabias case (Moore, 3253); \$1540 for six months, Eneas case (Hale's Report, 64; Moore, 3282); \$38,500 for six and one half months, Rahming case (Hale's Report, 64; Moore, 3282); \$15,400 for nine months, Reading case (Hale's Report, 65; Moore, 3283); \$8600 for excessive imprisonment covering about ten months, Nolan case (Hale's Report, 79; Moore, 3302); \$35,000 for long periods in 1853 and 1854 on charges not within jurisdiction of the courts, Jonan case (Moore, 3251); \$600 with interest at 6 per cent to day of award (time not stated), Brito case (Moore, 3252); \$10,000 for imprisonment, barbarous treatment, loss of health, and suffering (time not stated), Gahagan case (Moore, 3240); \$60,000 for imprisonment, injury, and injury to business, etc., extending over a long period, Van Bokkelen case (Moore, 1852); \$830 for too long imprisonment (about seven months), original imprisonment being justified, Tovell case (Hale's Report, 86; Moore, 3310); \$50 per day, Giacopini case (Ven. Arb. of 1903, 765); about \$46,000 for imprisonment for an uncertain time, Weile case (Moore, 1653).

It is to be noted with regard to all of these cases that, as in other instances of personal injury, rarely has interest been allowed, the umpire or commission giving almost universally a gross sum.

**364.** In very many of the cases cited, as for instance those of Rozas, Tovell, Halstead, Rahming, Eneas, Binney, Molière, Nolan, and Power, and in the two Le More cases, the original detention had been apparently justifiable, but damages were awarded for holding the claimant too long before trial, for never granting any trial, or for punishment without justification and arbitrarily or in a peculiarly cruel manner. Thus it was held that the military commander may detain in custody for trial but may not inflict unusual punishment (Alfred Le More case, Boutwell's Report, 94; French-American Claims Commission, Report, 580; Moore, 3311).

The Jones case (Moore, 3254) presented the peculiarity that excessive bail was demanded and the claimant kept in jail for thirty-one days because of inability to furnish it, the original arrest having been lawful.

**365.** An unusual situation was presented by the two cases of Bevitt (Hale's Report, 68) and Ashton (Hale's Report, 69; Moore, 3288). In the first of these an award was refused the claimant, who, after two years' residence in the Confederacy, attempted to enter the Union lines and was returned; while in the Ashton case \$6000 was given the claimant, who left the Confederacy and was returned to it under

similar circumstances, the only apparent difference between the two cases being that Bevit was detained but twenty days while Ashton was imprisoned three months and four days before being expelled, the award apparently having been given because of excessive and unnecessary imprisonment inflicted upon Ashton. In the Hall case (Hale's Report, 80 ; Moore, 3303) imprisonment to enforce the payment of an excessive fine was allowed for, and some of the cost of the fine and interest was included in the award of \$6000.

**366.** Where the claimant had probably been a spy, award was refused (Barry case, Hale's Report, 69 ; Moore, 3289).

When the claimant had been arrested in Mexico, on suspicion of a murder in Texas, and imprisoned with a view to his extradition, but no demand was made and he was discharged, but subsequently re-arrested and extradited, an award for the first arrest was refused by the commissioners of the Mexican-American Commission of 1868 in the Hill case (Moore, 3065).

Where the charges are sustained by proofs, no award for imprisonment will be given (Crawford case, Hale's Report, 67 ; Moore, 3286).

**367.** An administrator has been allowed to recover for the wrongful imprisonment of his intestate, in the De Luna case (Moore, 3276) receiving \$3000, the rule often followed in the civil law as to the right of survivorship for personal damages, rather than the rule of the common law being followed.

**368.** In the *Topaze* case (Ven. Arb. of 1903, 329) the umpire of the British-Venezuelan Commission was asked unofficially to express his opinion as to whether a demand upon the British government for twenty pounds each on behalf of the officers of the ship and for ten pounds each for the crew was excessive for imprisonment under circumstances of inconvenience and indignity, with want of food from 8 P. M. of one day until 10.30 P. M. of the following ; and after a very considerable investigation of the cases relating to unjustifiable imprisonment he had no difficulty at all in concluding that, guiding himself by the average conclusions of arbitral commissions, a sum not exceeding \$100 per day "approaches the minimum sum rather than the maximum allowed in cases for illegal arrest and detention, and is apparently the favored allowance by arbitrators."

#### PUNITIVE OR EXEMPLARY DAMAGES

**369.** While there is little doubt that in many cases the idea of punishment has influenced the amount of the award, yet we are not prepared to state that any commission has accepted the view that it



possessed the power to grant anything save compensation. In some cases the umpires have refused in terms the granting of punitive awards, indicating by suggestion at least that they would, the circumstances permitting, entertain the idea, although, as we have said, the power to inflict such damages has never been expressly claimed. For instance, in the Torrey case, Paúl, commissioner, speaking for the commission (Ven. Arb. of 1903, 162), indicated that, there having been no intention to hurt the person of an American citizen, but on the contrary as soon as confinement was known he was ordered placed at liberty by the president of the republic, the compensation to be given was limited to reparation for the personal inconvenience and discomfort of the claimant.

Duffield, umpire, in the Metzger case (Ven. Arb. of 1903, 578) said that nothing could "be allowed in the way of punitive or exemplary damages against Venezuela, because it appears . . . that the general commanding the army promptly took action against the offender and punished him by imprisonment," and, again, that "the action of the Venezuelan government in promptly arresting and punishing the offender relieves her from any liability for a malicious injury."

#### DAMAGES REFUSED, GOVERNMENT ACTING WITHIN ITS RIGHTS

370. When the government acts within its legal rights under its constitution, no damages may, of course, be recovered, the loss being held to be due, as it is often expressed, to *faits du prince*; and this is, of course, illustrated by cases under many of the headings embraced in this volume. (See, for example, Secs. 106-111 incl.)

In the Siempre Viva Co. case (Moore, 3784) Thornton, umpire, observed:

That the chief foundation of the charge against the Mexican government for the losses suffered by the company is that on various occasions Mexican officers by authority of law obliged the workmen at the company's mines to serve in the National Guard in which they were enrolled. The war which then existed in the country rendered this step a necessity. It was one of those misfortunes to which natives as well as foreigners were exposed. The owners of the mine in question were subject, like all other inhabitants, to the law of the country whether enacted after or before they acquired the mines; but in this instance the decree of April 12, 1862, which was enacted many months before the company was organized, declared that no Mexican between the ages of twenty and sixty years could be excused from taking up arms; so that it well knew the risk to which both by the written law and the natural necessities of the war which then existed it was exposed. In the opinion of the umpire, no claim can be made against the Mexican government for losses arising to foreigners out of the legal obligation which bound Mexicans to military service.

## CHAPTER X

### ALIENS

#### THEIR RIGHTS AND PRIVILEGES

**371.** While in a sense every title in this work bears upon the relations between aliens and foreign governments, yet it seems appropriate under this special heading to examine the exact position occupied by aliens in a country foreign to them, as from a consideration of this particular attitude are deduced other rights receiving examination at the hands of commissions.

**372.** Of course, a nation may by general provisions exclude a certain class of individuals entirely or place limitations upon their admission; but, as was stated in the *Cotesworth & Powell* case, Scruggs, umpire (Moore, 2081): "If a nation annexes any special condition to the permission to enter its territory, it should take measures to acquaint foreigners with the fact when they present themselves at the frontier."

**373.** Perhaps the most extensive discussion given the general subject is that contained in the opinion of Sir Henry Strong and concurred in by his associates in the matter of the claim of Rosa Gelbtrunk *vs.* Salvador (Foreign Relations of 1902, 877). Among other things he said:

A citizen or subject of one nation who, in the pursuit of commercial enterprise, carries on trade within the territory and under the protection of the sovereignty of a nation other than his own, is to be considered as having cast in his lot with the subjects or citizens of the state in which he resides and carries on business. Whilst on the one hand he enjoys the protection of that state, so far as the police regulations and other advantages are concerned, on the other hand he becomes liable to the political vicissitudes of the country in which he thus has a commercial domicile in the same manner as the subjects or citizens of that state are liable to the same. The state to which he owes national allegiance has no right to claim for him as against the nation in which he is resident any other or different treatment in case of loss by war — either foreign or civil — revolution, insurrection, or other internal disturbance caused by organized military force or by soldiers, than that which the latter country metes out to its own subjects or citizens.

Sir Edward Strong followed with a reference to the well-known letter of Prince Schwartzberg, replying to the British government,

in which it was contended that, however disposed the civilized nations of Europe might be to extend the limits of the right of protection, they would never come to the point of according to strangers privileges that the territorial laws did not guarantee to nationals; an opinion to which the Russian chancellor, Count Nesselrode, expressed his adherence (Calvo, fifth edition, Vol. III, Sec. 1285), and which was accepted by Mr. Seward (Wharton's Digest, Vol. II, 577) and by Secretary Bayard (Wharton's Digest, Vol. II, 581) and Secretary Marcy (Wharton's Digest, Vol. II, 586).

That there are qualifications of the rule as above expressed we shall find in the further elaboration of this work, but they are not such as to affect its general soundness.

**374.** The United States and Venezuelan Claims Commission of 1889 in the *de Brissot* case (Report, 457) quoted with approval Calvo (*Droit International*, Vol. III, Sec. 1278) to the effect that a state could not claim among other states a privileged situation which it would not be ready to grant them in its turn, by claiming for its subjects a position which is superior to that constituted by the common law of the inhabitants of the country. Fiore was also quoted (Moore, 2965) as saying :

Protection is illicit and unjustifiable where it has for its purpose to secure in favor of the citizen residing abroad a privileged position. Strong and powerful governments must not take advantage of their superiority and exaggerate the duty of protection by exercising pressure upon weak governments, in order to compel them to favor their citizens and exempt them from certain obligations or grant them privileges of any nature whatever.

**375.** In the case of *Sambiaggio* (Ven. Arb. of 1903, 666), Cushing was referred to approvingly, he having taken the following position (7 Opinions Attys. Gen., 229; Moore, 2965) :

As to exceptions to the general rule, they have grown up chiefly in Spanish America in consequence of the unsettled condition of the new American republics. Great Britain, France, and the United States have each occasionally assumed, in behalf of their subjects or citizens in those countries, rights of interference which neither would tolerate at home — in some cases from necessity, in others with very questionable discretion or justification, so as greatly to aggravate the evils of misgovernment therein, as will plainly appear on a careful study of the internal condition of the South American republics.

The language which we have quoted must not be understood to mean that foreigners may not obtain, through commissions, relief denied to citizens, for, as we shall see, rights may exist quite apart from the ability to enforce them, and remedies to enforce such rights

may therefore be open to foreigners through commissions which are perhaps harshly denied to the citizens.

**376.** Following the idea we have expressed, in the case of Cotesworth & Powell (Moore, 2081), Scruggs as umpire said :

When admitted strangers should obey the laws of the place ; and, in return for such obedience, they are entitled to the protection of the laws. All disputes, therefore, between themselves or between them and the natives, should, where such provision is made, be determined by the tribunals, and according to the laws of the places [citing Vattel, Book II, Chap. VI, Secs. 77, 78, Chitty's 4th Edition, 172 ; Phillimore, Law of Nations, Vol. II, Chap. II].

#### ALIENS ENTITLED TO PROTECTION

**377.** In the Aroa Mines case (Ven. Arb. of 1903, 344, 379), umpire Plumley said :

The right of the states to give protection to their subjects abroad, to obtain redress for them, to intervene in their behalf in a proper case, which generally accepted public law always maintains, makes these municipal statutes under discussion in direct contravention thereto and therefore inadmissible principles by those states who usually hold to these general rules of international law.

And therefore he rejected local legislation, the effect of which was to limit the rights of aliens to protect themselves against unjust loss or injury at the hands of the government, and cited with approval Woolsey's Introduction to International Law (Sec. 66, page 90), as follows : "They [aliens] are again, as we have seen, entitled to protection, and failure to secure this, or any act of oppression, may be a ground of complaint, or retorsion, or even of war, on the part of their native country.

**378.** In the *Montijo* case (Moore, 1444), the umpire, Robert Bunch, held as follows :

The general government of the union, through its officers in Panama, failed in its duty to extend to citizens of the United States the protection which, both by the law of nations and by special treaty stipulation, it was bound to afford. . . . The first duty of every government is to make itself respected both at home and abroad. If it promises protection to those whom it consents to admit into its territory, it must find the means of making it effective. If it does not do so, even if by no fault of its own, it must make the only amends in its power, viz., compensate the sufferer.

**379.** A less extreme view, but one, as we believe, in conformity with the true rule, was advanced by Thornton, umpire, in the Robinson case (Moore, 3038), wherein he said :

Reflecting upon the evidence on both sides, the umpire does not think that the Mexican authorities can be accused of a failure to furnish reasonable protection or to endeavor to punish the Indians for their depredations. It would be almost impossible for any government to prevent such acts by omnipresence of its forces.

**380.** That the duty of protection on the part of a government does not extend to cases where the offending citizens were beyond its power and control we shall have occasion to show when discussing the subject of its liability for the acts of mobs or unsuccessful revolutionists. As was said by Wadsworth, commissioner, speaking for the commission in the Prats case (Moore, 2888) :

The most literal interpretation of special protection cannot make an insurance. The whole article [of the treaty between the United States and Mexico of 1831, providing for "special protection "] defines the character of this protection and shows that the government merely designed to place aliens, transient or dwelling within their territory, on an equality with citizens in this respect. Herein consists this special protection. Indeed, it stipulates no more than every just government must undertake in behalf of its own citizens within its own jurisdiction. We do not think by this article either of the governments has agreed to afford any more or further protection to strangers within its borders than is justly due to its own citizens, or meant to establish any inequality between subjects and strangers either in the matter of protection or in the mode or measure of redress for injuries to persons or property. Each government *has* given special protection to all having a right to invoke it whenever it does all in its power to enforce *its* laws, repress and punish violence, and put down by force of arms armed revolts.

In a concurring opinion Sr. Palacio, in the same case (Moore, 2893), said :

It is the duty of the governments to protect in an efficient manner, against all kinds of unjust aggression, all persons residing within their jurisdiction and under the shelter of their laws. To this protection the alien residents are no less entitled than the citizens, but it would be wrong, however, to pretend a better right to it in the former case than in the latter; and the reason is very clear, because the supposition that a government is obliged to protect in a more efficient manner the foreign residents than the natives would be equivalent to admit that the duty of said government is not to secure in the highest degree, and in the most practicable manner permitted by law, the same protection to the person and property of its own citizens.

**381.** That the duty of protection for aliens is no greater than the state's duty to protect its own citizens, was again said by the United States and Venezuelan Claims Commission of 1889, in the Forrest case (Report, 35) :

To declare her obliged besides to protect foreign property against all the risks of war when she was unable to defend her own citizens, — not even the supreme good of her independence and political sovereignty, — would be to understand justice otherwise than it has been regularly understood in the international society as

well as in that of the *equo bono*. No nation can be required to do for others what she has not been able to do for herself. "States equally as individuals," turns Calvo to say [Droit International, Vol. III, Sec. 1308], "owe to each other aid and protection. . . . It is impossible to establish in this respect general and strict rules, but it may be assured that the state accomplishes its duty where it affords to others the relief it owes to itself."

**382.** The rule above laid down was followed by the commissioners under the treaty of the United States and Mexico of 1868, in the Mill case (Moore, 3033), wherein they held, speaking through Wadsworth, commissioner, that a citizen of the United States entering the territory of Mexico was bound to respect and obey the laws of that country, and so doing was entitled to protection to his person and property from the authorities of Mexico, as well as to the execution of justice, and that if the laws of nations were doubtful on this point, the treaties between the United States and Mexico were emphatic. So conceiving, however, it could not be claimed that the republic of Mexico had guaranteed the safety of citizens of the United States within her borders in every case and under all circumstances.

So in the Peruvian Claims Commission (Ruden case, Moore, 1654) the umpire, Valenzuela, observed that governments were bound to extend to foreigners the same measure of protection as they owe to their own citizens, and no more.

**383.** This right of protection is not lost by domicil abroad, according to the opinion of Bertinatti, umpire, in the Belcher case before the Costa Rican Commission (Moore, 2695), nor, as held by Lieber, umpire, in the Eigendorff case (Moore, 2718), by enforced temporary residence abroad, nor, as we have found by numerous cases before the Venezuelan Claims Commissions of 1903 and cases before almost every commission, by such domicil. We shall see, however, that the right of protection may be lost by unneutral conduct, by alliance with, through residence in, a country with which the respondent nation is at war, or by the claimant's assuming certain diplomatic and other functions under the respondent government; and, according to Thornton, umpire, in the Lacoste case (Moore, 2561), it may also be lost by presenting himself to another commission as the subject of another country.

**384.** In the Mateo case before the Mexican and American Claims Commission under the treaty of 1868 (Moore, 2462) it was held that the claimant, a free colored man, born in the United States, though not a citizen, was entitled to protection if wronged by a foreign government when within its jurisdiction for a legal and proper purpose.

In the Dimond case (Moore, 2386) the commissioners under the act of 1849 to adjust the claims that the United States assumed in place of Mexico, held as follows :

When citizens of the United States leave their own country and enter into the service of another, they thereby voluntarily renounce their allegiance, and with it relinquish their right to the protection of the government under which they were born. They are to be regarded as citizens of the country of their adoption and in whose service they are employed. As they can have no just claim to the protection of the government of the country which they have abandoned, they can convey none by assignment to one who has never renounced his allegiance, and has always been entitled to the protection due to a citizen of the United States.

Elsewhere we have fully discussed the effects of a citizen's change of domicil.

LOCAL GUARANTIES EXTEND EQUALLY TO FOREIGNERS AND  
TO NATIVES

**385.** In the *Costa Rica Packet* case, before the English and Netherlands Commission (Moore, 4953), it was held that the sovereignty of a state and the independence of the judicial or administrative authorities could not prevail to the extent of arbitrarily suppressing the legal security which ought to be guaranteed no less to foreigners than to natives in the territory of every civilized country.

**386.** In the Boffolo case (Ven. Arb. of 1903, 696, 705) the umpire said :

The further suggestion is made that Boffolo, being a foreigner, did not possess the right to criticise the government to the same extent as Venezuelans, while the government possessed a larger power over him. To this may be replied that the constitution of Venezuela conferred upon foreigners the same rights as were assured to natives, and for the supposed offenses not the slightest punishment could have been inflicted upon Venezuelans.

**387.** The obligation of an alien to obey the laws extends not only to the usual and customary laws but to martial law as well. So a majority of the commission (Dubos case, before the French-American Commission, Boutwell's Report, 93 ; Moore, 3319), although declaring that the claimant was governed by martial law, held that General Butler had violated the terms of his proclamation and therefore the claimant could recover for punishment unjustly inflicted.

**388.** We shall have occasion to consider, when discussing the question of responsibility for the acts of revolutionists, the liability of states to foreigners for damages arising therefrom, and we therefore reserve the discussion for that heading.

**389.** Bates, umpire of the United States and Great Britain Claims Commission of 1853, in the Uhde & Co. case (Report, 436, 451; Moore, 2695), held as follows :

According to the interpretation of the law of nations, by the highest courts in Great Britain, it is a point settled "beyond controversy, that where a neutral, after the commencement of hostilities, continues to reside in the enemy's country for the purposes of trade he is considered as adhering to the enemy, and as disqualified from claiming as a neutral altogether." (See Dr. Lushington's judgment in the case of the *Aina*, reported in the Jurist of July, 1855.) However good the claim of Messrs. Uhde & Co., as conquered Mexicans, against the United States, by the interpretation of the law of nations, as given by the decisions of the courts of Great Britain, may be, the claim ought to be excluded from this commission.

Again, by the same umpire, in the Laurent case (Report, 120, 159; Moore, 2690), the above language of Dr. Lushington was quoted with approval. The same rule was followed by the commission to adjust claims against Mexico under the treaty of 1849, in the Cooke (Moore, 2661) and Haggerty (Moore, 2663) cases.

**390.** Nevertheless, although a neutral residing in the enemy's country may be considered an enemy, the doctrine does not extend so far as to permit his unjust imprisonment, for, as Thornton, umpire, considered in the Costa case (Moore, 3724) :

As there was no proof that the claimant had committed any violation of neutrality . . . General Figueroa was [not] justified in taking him prisoner and in subjecting him to the treatment which he suffered, and in requiring him to leave the Mexican territory.

#### IN ENEMY'S COUNTRY, ALIEN'S PROPERTY BECOMES ENEMY'S

**391.** The natural corollary to the rule above given is that the property of an alien in the enemy's country becomes liable to seizure as well as that of the enemy, and so it was decided by Thornton, umpire (Moore, 3349), in the Foster and other cases, he holding : "By the strict rules of law their property found in the enemy's country, even when belonging to neutrals, which the claimants do not seem entirely to have been, was liable to seizure."

In the Costa case the same umpire (Moore, 3724) held that at the time a state of war existed, and that claimant was found by the troops of General Figueroa in a part of the country which was under the control of and protected by the enemy. The umpire was therefore of opinion that that commander, availing himself of the rights of war, committed no violation of them in taking possession of the property belonging to a person residing in the enemy's country.



Again, in the Carmalt case (Hale's Report, 90 ; Moore, 3157), the claimant's cargo having been condemned as prize when he at the time of the capture was domiciled within the Confederate States, his property was unanimously held liable to capture on the high seas as enemy's property.

So in the Castel case (United States and Venezuelan Claims Commission of 1889, 408 ; Moore, 3710), it was held :

Neutral property in a belligerent's territory shares the fate of war the same as that of subjects or citizens. If injured or destroyed in battle or siege, in the absence of circumstances evincing wantonness or culpable neglect on the part of the government within whose jurisdiction it is, the public law furnishes the owner no redress against such government. The case is not altered if the owner happens to be an officer of a neutral power.

**392.** In the Brook case (Hale's Report, 43 ; Moore, 3738), it was held by a majority of the British-American Claims Commission that "where . . . the taking of the property by the federal forces and the domicile of the claimant were within the enemy's lines, or in those portions of the enemy's country not reclaimed from the enemy, . . . on satisfactory evidence that the property was taken by authority or actually appropriated to military use" an award should be made therefor, Commissioner Frazer dissenting on the ground that one domiciled in the country of the enemy was himself an enemy in law, whether an actual enemy or not, and, by well-settled principles of public law, his sovereign had no right in such case to intervene in his behalf against the ordinary treatment of him as an enemy. To this principle, Hale, agent, was advised that the presiding commissioner agreed, "but in view of the fact that the United States had, by the establishment of the Southern Claims Commission, made provision for the compensation of its own citizens domiciled within the enemy's country, 'who remained loyal adherents to the cause and the government of the United States during the war,' for property taken in like manner (16 Statutes, Ch. 116, Sec. 2), he was of opinion that neutral aliens in like situation should be entitled to the same degree of compensation, and, if British subjects, to a standing before the commission for that end."

**393.** In the Kater case (Hale's Report, 44), claimant was allowed for property taken by Sheridan's army on its ride through the valley of Virginia in August, 1864. All the commissioners joined in this award, Sheridan's order of August 16, 1864, directing the seizure of mules, horses, and cattle for the use of the army, having in effect promised compensation for such property to loyal citizens.

**394.** In the Bertrand case (French-American Claims Commission, Boutwell's Report, 112; Moore, 3711) the claimant sought to recover for articles taken or destroyed by the army of the United States at his residence in Louisiana, the United States contending that as his property was destroyed upon the theater of war and while hostilities were flagrant, the government was not liable, but the commission made an award for property destroyed through fear that if not destroyed it would fall into the hands of the Confederate soldiers.

#### RULE AS TO TAKING OF NEUTRALS' PROPERTY

**395.** In the Kunhardt case (Ven. Arb. of 1903, 63), Bainbridge, commissioner, recognized as the rule that laid down in the Shrigley case (United States and Chilean Claims Commission of 1892, Moore, 3712), as follows :

(a) Neutral property taken for the use or service of armies by officers or functionaries thereunto authorized gives a right to the owners of the property to demand compensation from the government exercising such authority. (b) Neutral property taken or destroyed by soldiers of a belligerent with authorization, or in the presence of their officers or commanders, gives a right to compensation, whenever the fact can be proven that such officers or commanders had the means of preventing the outrage, and did not make the necessary efforts to prevent it.

This rule was accepted by Paúl, Venezuelan commissioner, who joined in the award, recognizing fully the responsibility of the Venezuelan government under the circumstances named.

**396.** In the Barrington case (Moore, 3674) the claimant's cotton and corn were destroyed and used by troops under the command of Colonel Para of the Mexican government. His fences were torn down and burned, and other property taken and destroyed by the same troops under the same command. The umpire said that there seemed to be no necessity for the destruction of property, since there was no proof that it was done in the presence of the enemy, who at that time did not seem to have been near. For property destroyed in this way, even though it was destroyed to prevent its falling into the hands of the enemy, as well as for forage taken and used by the troops, the umpire, Sir Edward Thornton, held that the claimant was entitled to an award.

The subject of the taking of neutral property for military purposes, or its especial exposure to the vicissitudes of battle and the right to recovery therefor will be further discussed under the heading of "War."

## ALIENS GUILTY OF UNNEUTRAL CONDUCT

**397.** The authorities are all agreed that claimants guilty of acts in violation of neutrality, or of hostility to the respondent government, forfeit right to consideration. Several times this question arose before the Mexican-American Claims Commission under the treaty of 1868. In the Fitch case (Moore, 3476), Thornton, umpire, said :

In performing a portion of these services the umpire is decidedly of opinion that the claimant violated the neutrality which, as a citizen of the United States, he was bound to observe. If the taking charge of the military engineering and erection of proper fortifications around Mazatlan, and the doing so a part of the time under a heavy fire from the French frigate *Cordillera*, is not a breach of that neutrality, it is difficult to say what can be considered so.

**398.** In the case of Torre & Lebourdette (Moore, 2816), it was held by Sir Edward Thornton that foreigners residing in Mexico during the war with France, and inside the lines of the French, had not a legal right to force a trade in the Mexican territory with the aid and under the escort of the French military. Such a trade was illicit and hostile, and all engaged in it were enemies of the opposing belligerents, who might lawfully break it up by force of arms, destroying the property or carrying it away as booty taken in the field.

In the Brannan case (Moore, 2757) the same umpire was "inclined to think that the claimant's participation in the raising of the loan was a violation of that neutrality which as a citizen of a neutral power he was bound to observe."

**399.** In the Green case (Moore, 2756) a claim was presented for services rendered and expenditures made in 1853 for Mexico under an agreement with General Ochoa. The umpire observed that "some of these services were of doubtful legality, and were certainly not in accordance with the neutrality which should have been observed by a citizen of the United States with reference to the hostilities which existed in Mexico."

The same umpire also said in the McAllen case (Moore, 2823): "McAllen took part with one of the conflicting parties [in Mexico] and thus violated the neutrality which as a foreigner he ought to have observed." And this view was followed in the Tripler case (Moore, 2823) and in the Iturria and Gonzales cases (Moore, 2824).

**400.** In the Colombian Commission, Bruce, umpire, observed (*La Constancia*, *Medea*, and *Good Return* cases, Moore, 2741):

The neutrality of a nation in a war waged between other powers renders obligatory, according to the law of nations, the observance of neutrality on every

citizen forming part of its body politic, however difficult it may be for its government to enforce, by municipal statutes, on the individual members of the community a conformity with the duties thus assured by it.

**401.** In the Campbell case (Moore, 2774), Baron Blanc said :

As the cargo, consisting of arms, ammunition and other military supplies, was admittedly intended by its owner, Augustin A. Arango, for the benefit of the insurgents against the Spanish government, and as the brig was allowed by Charles H. Campbell, either willfully or negligently, to fall into the hands of parties actively interested in promoting the insurrection, the claimants forfeited their right to the protection of the American flag, and are estopped from asserting any of the privileges of lawful intercourse in times of peace and any title to individual benefit of indemnity as against the acts of the Spanish authorities done in self-defense.

**402.** In the Rochereau case (Boutwell's Report, 101; Moore, 3739), before the French-American Claims Commission, a nonresident member of a firm purchasing bonds issued by New Orleans for the benefit of the Confederacy escaped being regarded as guilty of an unneutral act because the same were purchased by his partners in New Orleans without his knowledge ; while in the Dubois case (Boutwell's Report, 103 ; Moore, 3742), the memorialist having knowledge of the purchase and taking part of such bonds, his claim was disallowed.

**403.** In the Cuculla case (Moore, 2873) the question arose as to the claimant's right, based upon the undertaking of the so-called Zuloaga government in Mexico, to borrow money to be paid in installments from the proceeds of the maritime customhouses whenever that party should capture any, but the commissioners under the treaty of 1868 found no difficulty in rejecting it, on the ground that the contract was unneutral and unlawful, and that the Zuloaga government was not an authority of the Mexican government.

**404.** In the Drez case (Boutwell's Report, 103 ; Moore, 3742), where the facts were somewhat similar to those in the last two cases, the purchase having been made by an agent of claimant who, immediately upon being informed thereof, directed the resale, the commission awarded him the amount of the assessment which had been imposed upon him by the military authorities as a punishment for so doing.

**405.** In the Vernon case, before the British-American Claims Commission (Hale's Report, 81 ; Moore, 3304), the claimant had been actively engaged in the business of selling arms to the Confederate government and had run the blockade. A claim was made for his arrest and imprisonment, although at the time of such arrest he had upon his person contracts with the Confederate government ; and it was claimed, among other things, that the imprisonment was

unjustifiable and unduly prolonged, that his treatment when imprisoned was indefensible, and that an order of banishment from the United States and a subsequent refusal to revoke it were an outrage upon all law and justice; it was further claimed that engaging in commercial transactions with the Confederate government did not deprive him of his neutral character; but the commission unanimously disallowed the claim. So Jarman, Bowden, Redgate, and Ellsworth, in charge, when arrested, of portions of the contraband cargo of the *Peterhoff*, were considered guilty of unneutral conduct, and their claims for arrest and detention were disallowed (Hale's Report, 84; Moore, 3308).

The claim of Dean (Hale's Report, 85; Moore, 3309) was of a like character with those last mentioned, and was disallowed. Cauty (Hale's Report, 85; Moore, 3309) had better fortune, no sufficient allegation of unneutral conduct being sustained. And so in the case of Tovell (Hale's Report, 86; Moore, 3310), who was charged with having preached a disloyal sermon at Nashville and denounced the military authorities of the United States then in charge. It seems probable, however, that the ground of his award was an unduly prolonged confinement. In the Smith case (Hale's Report, 86; Moore, 3310) the circulating of placards in the city of Louisville, Kentucky, highly laudatory of General Robert E. Lee was apparently considered insufficient to constitute unneutral conduct, and an award was given, although possibly in this case because of a too prolonged detention, followed afterward by discharge without trial.

That a claimant must not ally himself with respondent's enemies was the holding in the Hoover case, Costa Rican Commission (Moore, 1567).

The obligation on the part of the alien to preserve a neutral attitude was recognized in a number of unreported cases coming before the commissions sitting in Caracas in 1903, and is referred to in the Di Caro case (Ven. Arb. of 1903, 769), wherein the umpire refused an allowance to the owners of one of the claims "because of their revolutionary career."

So also Barge, umpire, American-Venezuelan Claims Commission, in the Orinoco Steamship Company case (Ven. Arb. of 1903, 72, 96) was affected in his judgment because in his opinion "the government had sufficient reasons to believe claimant, if not assisting the revolutionists, at least to be friendly and rather partial to them."

In the Kelley case (Ven. Arb. of 1903, 340) the umpire, Plumley, held the charge of unneutral conduct so serious that it could only be maintained on indubitable proof.

## UNNEUTRAL CONDUCT OF RESPONDENT NATION

**406.** The necessity of the preservation of a neutral attitude, whether the party charged with the wrongful act be a claimant or a respondent, was illustrated by the language of the commissioners in the *Alabama* case, as well as by the provisions of the Treaty of Washington, for the commissioners said (Moore, 655) :

The effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offense is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence; and . . . the privilege of exterritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality; and . . . the absence of a previous notice cannot be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation, etc.

The commission further held that the failure to take sufficient steps with regard to the *Alabama* in view of the facts constituted a failure to use due diligence in the performance of neutral obligations.

## ALIEN VIOLATING LAWS OF HIS COUNTRY

**407.** In a number of cases the ground upon which commissions have acted adversely to the claimants was expressly stated to be that the claimant had violated the laws of his own country, and thereby forfeited all right to claim its aid before an international tribunal, although in one or two cases this defense was maintained on behalf of the claimants, as we think erroneously, to be one which might be waived.

**408.** In the Brannan case (Moore, 2757) already referred to the umpire said :

There can be no doubt that the enlistment, equipment, and transportation of troops to Mexico for service in the Mexican army were violations not only of neutrality but of the laws of the United States. The umpire cannot believe that this international commission is justified in countenancing a claim founded upon the contempt and infraction of the laws of one of the nations concerned.

The same umpire took a like position in the case of Gros (Moore, 2771).

Bruce, of the Colombian Commission (Moore, 2741), in the cases of *La Constancia* and others said :

The acts, therefore, out of which these claims arise cannot be considered by an international commission in any other light, when committed by citizens of the United States as such, than as unjustifiable outrages on the persons and property of the subjects of friendly nations, and the quality of American citizenship, which it is necessary to invoke in order to bring these claims within the scope of the constitution [commission?] operates as a fatal bar to their admission.

**409.** In the cases of the *Good Return* and the *Medea* (Moore, 2739), Hassaurek, American commissioner of the Ecuadorian Commission, speaking for that body, said :

I agree with the attorneys for the claimants that it would perhaps not become Colombia to make this defense, after having committed an outrage against the rights of Captain Clark. But I do not look upon Colombia as interposing these objections. I hold it to be the duty of the American government and my own duty as commissioner to state that in this case Mr. Clark has no standing as an American citizen. A party who asks for redress must present himself with clean hands. His cause of action must not be based on an offense against the very authority to whom he appeals for redress. It would be against all public morality, and against the policy of all legislation, if the United States should uphold or endeavor to enforce a claim founded on a violation of their own laws and treaties, and on the perpetration of outrages committed by an American citizen against the subjects and commerce of friendly nations.

**410.** The same view was taken by Wadsworth, commissioner, in the *Cuculla* case (Moore, 3479), he saying :

If the sovereign, whose laws have been violated by a contract for aid between a belligerent power and his subject, waives the offense and demands indemnity according to the contract, is it admissible to allow the offending government to say : "I violated your laws in making such a contract, therefore I ought not to comply with it upon your demand." Would not the injured sovereign reply with much reason, "The enforcement of my laws, broken by you, cannot concern you; that is an affair exclusively my own; if I see cause to overlook it, how can you rightfully judge it?" Now, it appears to me that the mixed commission could not have ordered and awarded payment on the contracts of General Mena if they were impure or a nullity, and I am certain that a recognition of them by the Mexican Congress did not prevent them from being flagrant violations of the neutrality laws of the United States.

The commissioner held, therefore, that the contract was immoral, and refused to sanction an award.

**411.** The most recent case in which the doctrine we are now considering has received discussion is that of *Jarvis* (Ven. Arb. of 1903, 145), wherein it was held that payment of bonds issued in consideration of services rendered in support of an unsuccessful revolution against Venezuela's constituted government with which the United States was at peace, could not be enforced against Venezuela. The

consideration for the bonds was money and supplies given Páez when he was an unsuccessful revolutionist. Returning at a later time to Venezuela, he was at a public meeting of the citizens of Caracas proclaimed supreme civil and military chief of the republic. He was not recognized, however, by the United States, but, while still exercising the powers incident to the office, issued the bonds. Ten days after their issue the contesting government was agreed upon as the proper one, and was later recognized by the United States. Bainbridge, commissioner, for his associate and himself, held that "so far as the claimants are concerned, the issuance of the Jarvis bonds was not the 'act of the Venezuelan government.' It is doubtless true that the question whether the Páez government was or was not the *de facto* government of Venezuela at the time the bonds were issued is one of fact. But the decision of the political department of the United States government on November 19, 1862, that there was no such conclusive evidence that the Páez government was fully accepted and peacefully maintained by the people of Venezuela as to entitle it to recognition, must be accorded great weight as to the fact, and *is in any event conclusive upon its own citizens*. And certainly the evidence that the Páez government was 'submitted to by the great body of the people' was no stronger on April 14, 1863, when the Jarvis bonds were issued and when, as a matter of historical fact, it was encompassed by its enemies and tottering to its fall."

In support of his position, Mr. Bainbridge referred to Revised Statutes, Secs. 5283 and 5286, and to his strong if not irresistible opinion that Jarvis had violated the neutrality laws of the United States in such a measure as to have rendered himself liable to a criminal prosecution therefor, and contended that he had further violated an existing treaty and the established rule of international law that when two nations are at peace all the subjects or citizens of each are bound to commit no act of hostility against the other. From the standpoint of precedent he relied upon *Dewutz vs. Hendricks* (9 Moore, C. B., 586), *Kennett vs. Chambers* (14 Howard, 38), and the decision of Mr. Hassaurek in the cases of the *Medea* and the *Good Return* (Moore, 2739) already referred to.

412. In the arbitration by the Spanish government in the Cerruti case (Moore, 2119) the arbitrator said that there could be no doubt that an alien had no right to meddle in political affairs and especially in political rebellions, but the rights of the government might be secured by the expulsion of the alien or the application to him of the penal laws; that if he was allowed to remain in the country unmolested,



if his alleged improper or unlawful acts remained unpunished, the question seemed to have become one of politics rather than of law. The authorities of the state of Cauca neither expelled nor condemned Cerruti, but declared him guilty and sequestered his property before submitting his acts to the judicial power. An award, therefore, was found in favor of the claimant.

413. The commissioners under the act of 1849 (Moore, 2390) allowed in the Meyer case recovery in favor of the claimant, who had been guilty of unneutral acts in violation of the statutes of the United States, when a new consideration had arisen therefor, and referred to the fact that similar awards had been made by the commission of 1839, with the full concurrence of the Mexican as well as the American commissioners, and that the validity of claims based upon such latter obligation had been recognized by the Court of Appeals in Maryland, in the case of Gill, Trustee, *vs.* Oliver et al.

The same commission took a like position in the case of Meade, Executrix (Moore, 3432), saying :

Although the government of the United States could not be justified, under the law of nations, in interposing its authority to enforce a claim of one of its citizens growing out of services rendered in violation of its own laws, and its duties as a neutral nation, yet if the nation against whom such claim exists sees proper to waive the objection, and agrees to recognize the claim as valid and binding against it, the tribunal to which it is referred for settlement, cannot assume for it a defense which it has expressly waived.

#### SOME PARTICULAR ACTS PROHIBITED OR PERMITTED TO NEUTRALS IN BELLIGERENT COUNTRY

414. Entering upon a trade prohibited for reasons of self-defense in time of war is to be considered an unneutral act, and was so held by Mr. Wadsworth in speaking for the commission in the Biencourt case (Moore, 2484). The same rule was followed in the Scott case (Moore, 2817) by the same commissioner.

415. Payment of customs duties to an insurgent government, however, would not constitute an unneutral act, being, as it would be, simply a submission to the government, which, so far as the claimant was concerned, was *de facto*, and not constituting active aid or assistance ; and it was so held in the case of De Forge (Boutwell's Report, 105 ; Moore, 2781). In the Guastini case (Ven. Arb. of 1903, 730), payment of local taxes to a revolutionary government was not considered by the umpire of the Italian-Venezuelan Commission as prejudicing claimant's right to recover.

ALIEN RENDERING MILITARY SERVICE TO FOREIGN COUNTRY WITH  
CONSENT OF HIS OWN, RESERVES HIS RIGHT TO PROTECTION

**416.** Although we have seen that under certain circumstances aliens may lose their right to protection by entering the military service of the respondent country (Sec. 253), and although it has been held further, as has also been shown (Sec. 254), that an alien rendering such services loses his right to appear before a commission as the claimant under a contract voluntarily entered into by him, nevertheless in the Corcuera case, before the Spanish-Venezuelan Commission (Ven. Arb. of 1903, 936), Gutierrez-Otero, umpire, held that the claimant, having rendered such service with the permission of his government, had, therefore, preserved his nationality, and he rendered an award for the amount due because of such military employment.

That acceptance of even civil employments may entail loss of citizenship, and therefore of protection from the parent country, we have seen also when discussing the subject of "Citizenship of Parties."

CHILDREN OF ALIENS

**417.** In the event of conflict of laws, the children of a foreigner born and domiciled in the respondent nation may not before a commission be the beneficiaries of the claim, and this was so held in the Miliani case (Ven. Arb. of 1903, 754), the umpire concluding that, while the children of Miliani might with absolute propriety be recognized as Italians in Italy, or by Italy in any country other than Venezuela, in that country and, as a consequence (following the decision cited in the Brignone case relating to a married woman, and accepting the domicil as furnishing the rule in case of conflict), before the arbitral tribunal, they must be considered for the purposes of the pending litigation as Venezuelans. The umpire's view finds support in Bluntschli (*Droit Public Codifié*, Sec. 374), and he followed the same rule in the Giacomini case (Ven. Arb. of 1903, 765) and other cases discussed under the head of "Parties."

EXPULSION OF ALIENS

**418.** The question of the right of a state to expel a foreigner from its territories received more elaborate consideration in the Boffolo case (Ven. Arb. of 1903, 696) than in any other coming before international tribunals. It appears from the facts as set forth by Ralston, umpire of the Italian-Venezuelan Commission, that the claimant

reached Venezuela in June, 1898, and in the spring of 1900 was a householder in Caracas and the publisher of an Italian weekly newspaper, in an issue of which in April, 1901, appeared an article somewhat critical of the minor local judiciary, and also referring, but in an unimportant manner, to the President. The article recommended the reading of *El Obrero*, a socialistic paper. For three times the *Gaceta Oficial* contained a decree directing his expulsion, and immediately thereafter, or perhaps simultaneously, he was arrested and transported to Curaçao, but through the intervention of the Royal Italian Legation was allowed to return about a month later.

The umpire considered that the general power to expel foreigners, at least for cause, existed in governments, and could not be doubted, referring to the Hollander case (Foreign Relations of 1895, 775 and 881; Wharton's International Law Digest, Vol. II, Sec. 206; Rolin-Jaequemyns's report on the subject to the Institute of International Law in 1888 (Revue de Droit International, Vol. XX, 498); Bluntschli's Droit International Codifié, Secs. 383 and 384; the sentence of Desjardins in the Ben Tillett affair (Journal du Droit International Privé, Vol. XXVI (1899), 203); Professor Von Bar in Journal du Droit International Privé, Vol. XIII, 6; Woolsey's International Law, Sec. 63; Moore, 3334 and 3348).

The umpire's conclusion, after a summary of the authorities above referred to, was :

(1) A state possesses the general right of expulsion; but (2) expulsion should only be resorted to in extreme instances, and must be accomplished in the manner least injurious to the person affected. (3) The country exercising the power must, when occasion demands, state the reason of such expulsion before an international tribunal, and, an inefficient reason or none being advanced, accepts the consequences. (4) In the present case the only reason suggested to the commission would be contrary to the Venezuelan Constitution [as interfering with freedom of speech], and as this is a country not of despotic power, but of fixed laws, restraining, among other things, the acts of its officials, these reasons (whatever good ones may in point of fact have existed) cannot be accepted by the umpire as sufficient.

Commenting upon the amount of damages to be awarded, the umpire said :

The honorable representative of Italy has indicated that he would be content to accept five thousand bolivars, and considering the harshness of expulsion as a remedy, the fact that only great provocation will, in the eyes of international law, justify its exercise, and the further fact that expulsion of foreigners so readily leads the way to the gravest international difficulties, as it may be regarded as a national affront, the amount asked seemed not intrinsically unreasonable. But

bearing in mind the low character of the man in question (as developed before the commission) and that his speedy return was permitted, the umpire believes his full duty will be discharged in allowing him two thousand bolivars [about \$400], and an award of this amount will be entered.

**419.** The question of expulsion also arose in the Maal case before umpire Plumley of the Netherlands-Venezuelan Commission (Ven. Arb. of 1903, 914), and he stated as a matter of law :

There is no question in the mind of the umpire that the government of Venezuela in a proper and lawful manner may exclude, or, if need be, expel, persons dangerous to the welfare of the country, and may exercise large discretionary powers in this regard. Countries differ in their methods and means by which these matters are accomplished, but the right is inherent in all sovereign powers and is one of the attributes of sovereignty, since it exercises it rightfully only in a proper defense of the country from some danger anticipated or actual.

In this case "had the exclusion of the claimant been accomplished in a rightful manner without unnecessary indignity or hardship to him, the umpire would feel constrained to disallow the claim." Because, however, of the insults to which the claimant had been subjected in connection with his expulsion, which in point of fact was rather in the nature of exclusion because of suspicions entertained against him during a time of war, the umpire allowed an award of \$500.

**420.** In the Oliva case (Ven. Arb. of 1903, 771) the claimant was practically invited to Venezuela, a concession having been given him which required his presence at Caracas, and the umpire who decided the Boffolo case said that he did "not find it necessary to again discuss the principles covering the right of expulsion. The existence of this right was recognized, and the dangers incident to its exercise were sufficiently pointed out in the case of Boffolo, in which an award of two thousand bolivars was given. It is sufficient in the present case to say that the expulsion of Oliva appears to have taken place without legal right, although it is recognized that the government at the time felt itself authorized to exercise its power. The mere idle suspicion of the consul should not, however, in an international commission be received as a sufficient justification for the infraction of an international right."

**421.** In the Paquet case, Filtz, umpire of the Belgian-Venezuelan Commission (Ven. Arb. of 1903, 265), said :

That the right to expel foreigners from or prohibit their entry into the national territory is generally recognized; that each state reserves to itself the exercise of this right with respect to the person of a foreigner if it considers him dangerous to public order, or for considerations of a high political character, but that its

application cannot be invoked except to that end; that, on the other hand, the general practice among governments is to give explanations to the government of the person expelled if it asks them, and when such explanations are refused, as in the case under consideration, the expulsion can be considered as an arbitrary act of such a nature as to entail reparation, which is aggravated in the present case by the fact that the attributes of the executive power, according to the Constitution of Venezuela, do not extend to the power to prohibit the entry into the national territory, or expelling therefrom the domiciled foreigners whom the government suspects of being prejudicial to the public order.

An award of 4500 francs was allowed.

In this case the Belgian commissioner had maintained that "the constant practice among European governments has been never to refuse to give to the representative of a nation of the party expelled the reasons which have moved the government expelling him to exercise this right. The demand, therefore, that this be done in this case does not seem unreasonable." The Venezuelan commissioner held that "the measure of expulsion taken against him will, nevertheless, be found to be justified for high political reasons because of the rights of public policy with which the authorities are vested, for the public interest and for the national safety, which they alone are able to determine" (citing André Weiss's *Elementary Treatise on Public International Law*, 34; Pradier-Fodéré, *Public International Law*, Vol. III, Sec. 1857).

**422.** One of the earliest cases of expulsion brought before any claims commission was that of Orazio de Attellis, a claimant before the commission under the Mexican-American Convention of 1839 (Moore, 3334). The claimant was twice expelled. The American commissioners allowed a considerable sum for the first expulsion, but the umpire disallowed it on the ground that he was not at that time a citizen of the United States, although he had made a declaration of intention to become one. He was, however, naturalized in 1829, and for the second expulsion, for which the American commissioners awarded \$54,588, the umpire allowed \$50,000.

**423.** Consideration of this subject was given by Sir Edward Thornton of the Mexican-American Commission under the treaty of 1868, in the Lacoste case (Moore, 3347), wherein the umpire said:

With regard to the expulsion of the claimant from the country, it must be remembered that, owing to the French invasion, the President of Mexico was invested with great and extraordinary powers; and although such powers ought not generally to be exercised for the expulsion of foreigners without good cause shown, the case is different where the foreigner is a countryman by birth of the invaders and conceals, as the claimant appears to have done, the fact that he had adopted

the United States as his country. The expulsion does not, however, appear to have been accompanied by harsh treatment, and at his request the claimant was allowed an extension of the term fixed for his leaving the country.

The claim was accordingly dismissed.

**424.** In the Costa case (Moore, 3724) the same umpire considered that, as there was no proof that the claimant had committed any violation of neutrality, the Mexican authorities were not justified "in taking him prisoner and in subjecting him to the treatment which he suffered, and in requiring him to leave the Mexican territory." An award was therefore given for \$2000 without interest.

**425.** In the Zerman case, Thornton, umpire (Moore, 3348), held that, "strictly speaking, the President of the republic of Mexico had the right to expel a foreigner from its territory who might be considered dangerous, and that during war or disturbances it may be necessary to exercise this right even upon bare suspicion ; but in the present instance there was no war, and the reasons of safety could not be put forward as a ground for the expulsion of the claimant without charges preferred against him or trial ; but if the Mexican government had grounds for such expulsion, it was at least under the obligation of proving charges before this commission. Its mere assertion, however, or that of the United States consul in a dispatch to his government, that the claimant was employed by the imperialist authorities does not appear to the umpire to be sufficient proof that he was so employed or sufficient grounds for his expulsion." An award of \$1000 was given.

**426.** In the Phillips case (Moore, 3350) the claimant being a consul of the United States, but having excited bitter feelings toward himself during a time of revolution, Lewenhaupt, umpire, said :

The umpire is of opinion that he has no jurisdiction to enter into any question concerning the rights of the claimant as a United States consular officer. The question to be decided is whether the claimant received the protection due to him as a private American citizen, and with regard to this question the umpire is of opinion that, under the circumstances in this case, Spain would not have incurred any liability even if he had been expelled.

An award was refused.

**427.** The Casanova case, which arose before the Spanish-American Commission (Moore, 3353), was one touching the right of exclusion rather than one of expulsion ; the claimant having been ordered away immediately after his arrival, and on the authority of Bluntschli (Sec. 382), authority to exclude was fully recognized.

The San Pedro case was one before the same commission (Moore, 3354), in which the so-called expulsion was merely an alternative to being tried upon a charge of implication in an insurrection, and no damages were awarded.

**428.** In the Cerruti case (Moore, 2119) the Spanish government as mediator recognized the right of the Colombian government to expel the claimant had he meddled in political affairs and especially in political rebellions.

**429.** A number of cases of expulsion arose before the commissioners under the act of 1849, deciding the claims primarily against the Mexican government (Moore, 3334-3347), and in many of them damages were awarded for wrongful expulsion without elaborate argument as to the foundation of the right or the conditions of its exercise.

## CHAPTER XI

### GOVERNMENT

#### ACTS OF SOVEREIGNTY

430. In commencing a general discussion of the topic of Government, as treated by arbitral tribunals, we cannot do better than quote, almost in its entirety, a consideration of the subject had by the Franco-Chilean Arbitral Tribunal sitting in Switzerland for the determination of claims against a fund arising from the sale of guano, touching as it does upon very many of the points hereinafter presented as having been brought before other like commissions. Says this tribunal (Decision, 290) :

Whereas, according to a principle of international law, denied at first theoretically in the dynastic interest by the diplomacy of European monarchies, applied, however, in fact in a series of cases to-day universally admitted, the capacity of a government to represent the state in its international relations does not depend in any degree upon the legitimacy of its origin, so that foreign states no longer refuse recognition of a government *de facto*, and that the usurper who holds power with the consent express or tacit of the nation, acts and concludes validly in the name of the state treaties that the restored legitimate government is obliged to respect (Oppenheim, *Völkerrecht*, 1844, p. 141; Martens, *Lehrbuch des Völkerrechts*, Vol. I, § 81; Bluntschli, *Droit International Codifié*, §§ 44, 45, and 120; Gareis, *Institutionen des Völkerrechts*, § 31, p. 90; Holtzendorff, *Handbuch des Völkerrechts*, Vol. II, § 21; Encyclopedia, p. 1210; Pradier-Fodéré, *Traité de Droit International Public*, Nos. 134 and 149; Wheaton, *Elements of International Law*, 5th ed., Vol. I, p. 38; Twiss, *Law of Nations*, Vol. I, § 21; Fiore, *Trattato di Diritto Internazionale Pubblico*, 1887, Vol. I, Nos. 316 et seq.; Rivier, *Principes du Droit des Gens*, Vol. II, pp. 121 and 441).

That this principle is not doubtless of an immediate application in this instance, since it is a question of the validity not of a contract made by the Dictator Pierola with a foreign power and subject to the rules of international law, but of a contract under common law concluded with a foreign individual who had expressly agreed to submit himself to the laws of Peru and to the jurisdiction of Peruvian tribunals, but that there is occasion to consider it as constituting a rule equally from the point of view of public internal law for the determination of contractual relations formed between a government *de facto* and an individual on account of its conformity with the notion even of a state, such as the European community conceives it, to which community South American nations are attached by their traditions, their origin and the character of their institutions; whereas in effect the reasons of decision are identical in the two hypotheses; that outside of the



case of pure anarchy the permanence of the existence of a state supposes necessarily the presence of a power which acts in its name and which represents it; that this necessity is so evident that it has been recognized since the Middle Ages by juriconsults who see in the sovereign the personification of the state and deduce therefrom the obligation of the prince to recognize engagements taken in the name of the state by the prince who has preceded him; that it finds its expression in the maxim of French law, according to which the King never dies; that Grotius in his turn has proclaimed it in teaching that the obligation of debts contracted by the state persists independently of all change in the form of the government of the country (Grotius, Liber II, Chap. IX); that modern juriconsults have at times varied as to the explanation of the principle by virtue of which the power to represent the state is transmitted from one government to another, some seeking it in the idea of a prescription which is established for the benefit of the usurper; others in the presumption, if it concerns a legitimate fallen prince, of a renunciation of the exercise of his rights in favor of the persons who have succeeded him; others in the hypothesis of a consecration of the new authority by the effect of the express or tacit consent of the nation; but that the most authoritative are unanimous in professing respect for its consequences, such as have been formulated for the first time in a methodical and complete fashion in various works by the publicist H. A. Zachariae, on the occasion of the disputes which arose in Germany after the dissolution of the Kingdom of Westphalia, concerning the validity of the acts done by King Jerome; that they do not limit their application to the cases where the new régime is maintained for a prolonged length of time, but merely consider the point of determining whether or not this régime presented attributes of stability or authority of such a nature that its agents might be considered to wield as a matter of fact those powers abandoned by the fall of the preceding power; so that they thus make the validity of the acts of a government, though transitory and in the hands of a usurper, dependent upon considerations identical with those on which foreign powers recognize the head of a state who announces his coming into power.

That evidently this doctrine has no application to agreements entered into by a chief of insurgents, "for a chief of insurgents does not represent or bind the state" (Rivier), but it displays all its effects according to the most generally admitted definition with relation to acts done by an intermediary or provisional government which has given proof of vitality and exercises power in fact in an incontestable fashion without finding itself in conflict with a regular coëxisting government; that it is not conceivable in fact that during the time when the new government exists under such conditions the interior affairs of the state rest suspended while the exterior transactions are, according to international law, validly accomplished. . . . That a solution which would deny under pretext of illegitimacy legal effect to contracts had with a government *de facto* at a moment when such government was the only recognized organ of the nation, would imply the negation even of the idea of a state.

Whereas, the representatives of Peru invoke in their first memorial the authority of Calvo (Vol. I, § 100) and of Klüber (Vol. I, No. 259), according to whom the acts of the intermediary government would be null, save in the case where they have been "conformable to the precepts of the constitution and of the old administration"; but that the distinction proposed by these two juriconsults between acts conformable and acts not conformable to the old constitution from the point of

view of their validity is not justified; that it is rejected expressly or impliedly by all the authors above mentioned; that in effect the constitution of the state is only in the most general sense of the word a mode according to which the state is organized, or, following another definition, the ensemble of the rules written or unwritten which determine the attributes of political powers and the relations of those who govern with those who are governed (Pradier-Fodéré, Vol. I, No. 301); that it is clear that these attributes and these relations are susceptible of modification, and that in case of the substitution of one government for another by revolution, they would have to be generally modified to be put in harmony with the circumstances and the new necessities, and that the same principle which consecrates in the condition above expressed the institution of a new government, authorizes this government to determine the mode of exercise of the power with which it is invested. That Klüber and Calvo themselves admit an exception to the rule that they formulate in the case where the act not conformable to the old constitution was of "demonstrated necessity and utility." . . .

That the authority of Bluntschli . . . gives an identical solution in the following proposition of *Droit International Codifié*, No. 45, . . . "when the intermediary government has not reached a real existence and consequently one cannot accord to its measures the value of acts of a state, then only the restored government can ignore them." . . .

That in the case of Manin at Venice, of Kossuth in Hungary, of Miramon in Mexico, . . . and more recently of the Paris Commune in 1870-1871, as well as in the case of Kosciusko and the republics of Rome and of Baden in 1849, the point at issue was acts done or engagements undertaken by insurrectionary governments still in a struggle with the regular government, or the authority of which was not recognized in fact either by the nation or abroad, in such manner that the validity of their acts and engagements has been disputed by just application of the principles above announced; that the practice of international law of European states shows by numerous examples that in fact the rule according to which "the acts of the government born of a revolution should be considered as valid by the restored government" has been applied in the matter of alienations of the public domain, as well as in the matter of the creation of debts.

The same decision recognized the validity of a dictatorial government accepted generally, as shown by the adhesion of popular assemblies held throughout the extent of the country, and impliedly, by the fact that the rest of the population submitted without opposition to it.

**431.** Under the heading of "Prescription" we shall have occasion to consider one of the methods by which title to, which is equivalent to saying sovereignty over, a particular tract of land may be acquired. In the *Cuculla* case (Moore, 2877) Wadsworth, speaking for the Mexican-American Commission, in an opinion in which his Mexican associate agreed, in response to a query as to when sovereignty may be said to exist, said:

Perhaps Mr. Austin, in his lectures on jurisprudence, has expressed this notion of sovereignty as concisely and accurately as any one: "If a determinate human superior, not in a habit of obedience to a like superior, received *habitual* obedience

from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent" (Vol. I, 226). Says Wheaton: "The habitual obedience of the members of any political society to a superior authority must have once existed in order to constitute a sovereign state" (Dana's ed., Part I, Sec. 23, p. 34). This habitual, obedience of the members of a political society (of the "bulk" of them) must, in fact, exist to constitute a government.

**432.** The question of sovereignty over islands at some distance from the mainland, in this instance about twenty miles out to sea, which islands had never been reduced to any useful purpose, and were in point of fact barren rocks, valuable only for a deposit of guano, received some consideration in the case of Gowen and Copeland (Moore, 3354), Mr. Findlay delivering the opinion of the commission. He seems to have considered that the taking of possession in the name of the United States (the United States never claiming jurisdiction and making no protest when its flag was hauled down under the orders of the captain of a Venezuelan man-of-war) was insufficient to give jurisdiction to the United States, and tacitly recognized the rightfulness of the jurisdiction forcibly exercised thereafter by Venezuela, although holding her government responsible for the result of her actions in connection with her seizure, she forcibly compelling the claimants to abandon the islands (Report of United States and Venezuelan Claims Commission of 1889, 39). The foundation for an equitable claim was recognized because "there was no claim made by any one to vacant sterile rocks, lying far out to sea, and by their very situation and appearance suggesting that they were no man's land," the commission thinking therefore that "the claimants have an equity to be reimbursed for their outlay in taking possession of what was apparently derelict and abandoned property."

**433.** National sovereignty over territorial waters, as is well understood, "is determined by the range of cannon measured from the low-water mark," as was said by Mr. de Martens, arbitrator, in the *Costa Rica Packet* case (Moore, 4952), he adding "that on the high seas even merchant vessels constitute detached portions of the territory of the state whose flag they bear, and, consequently, are only justiciable by their respective national authorities for acts committed on the high seas."

**434.** In the case of the schooner *Washington* (Report of British-American Claims Commission of 1853, 170, 172), Upham, American commissioner, said, referring to the jurisdiction of Great Britain over the Bay of Fundy:

The law of nations does not, as I believe, give exclusive jurisdiction over any such large arms of the ocean. Rights over the ocean were originally common to all nations, and they can be relinquished only by common consent. For certain purposes of protection and proper supervision and collection of revenue, the dominion of the land has been extended over small inclosed arms of the ocean, and portions of the open sea, immediately contiguous to the shores. But beyond this, unless it has been expressly relinquished by treaty or other manifest assent, the original right of nations still exists of free navigation of the ocean, and a free right of each nation to avail itself of its common stores of wealth or subsistence (Grotius, Book II, Chap. II, Sec. 3; Vattel, Book I, Chap. XX, Secs. 282, 283).

Mr. Hornby, the British commissioner, did not agree with this general view, but on reference to the umpire, Mr. Bates (Moore, 4344), the latter said :

The Bay of Fundy is from sixty-five to seventy-five miles wide and one hundred and thirty to one hundred and forty miles long. It has several bays on its coasts. Thus the word bay, as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume the sovereignty. . . . The conclusion is, therefore, in my mind irresistible that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the treaties of 1783 and 1818.

435. The question of the right of a nation to pursue merchant vessels suspected of committing a municipal offense beyond the limits of its territorial sea, was considered by Mr. Asser in the case of the *C. H. White*, coming before him as arbitrator (Whaling Claims against Russia, Foreign Relations of 1902, Appendix I, 462), he saying :

That the seizure of the schooner took place, according to the party claimant, at about twenty, and according to the defendant party at about eleven or twelve, miles from Russian territory, and that even if the latter version be the true one, it results that the act was perpetrated outside the Russian territorial waters, which is moreover admitted by both parties; . . . that the system of the defendant party, according to which a war ship of a state would be permitted to pursue even beyond the territorial sea any vessel whose crew was guilty of an illegal act in territorial waters or on territory of that state, could not be recognized as conforming to the principles of international law, since the jurisdiction of a state does not extend beyond the limits of the territorial sea, unless that rule has been derogated by a special convention.

He did not therefore think it necessary to examine as to whether the claimants had been guilty of illegal sealing in Russian territorial waters.

436. Of course the sovereignty of the state and independence of the judicial or administrative authorities cannot prevail to the extent of arbitrarily suppressing a legal security which ought to be guaranteed no less to foreigners than to natives in the territory of every civilized country, and it was so held in the *Costa Rica Packet* case (Moore, 4953) and in the *Boffolo* case (Ven. Arb. of 1903, 696).

**437.** In considering the powers of consular officers to refuse clearance of vessels to ports closed by a paper blockade, we shall find that the sovereign power of a nation could not properly be exercised beyond its territorial limits, and within the territory of another nation ; and so, therefore, Mexico causing the seizure of property on the soil of the United States and its removal to and sale in Mexico by officials of that country, such act constituted an injury to the claimant, for which he was entitled to indemnity under the treaty, notwithstanding his own bad conduct in evading the laws of Mexico, as was held in the Giddings case, before the Mexican-American Commission of 1868 (Moore, 4379).

**438.** The right of the government to close ports in the exercise of its sovereign powers was discussed before several of the Venezuelan commissions of 1903. In the case of the Orinoco Steamship Co. (Ven. Arb. of 1903, 72, 95) the umpire recognized its "right to open and close, as a sovereign on its own territory, certain harbors, ports, and rivers in order to prevent the trespassing of fiscal laws," and said that this right could not be denied, much less "when used in defense not only of some fiscal rights, but in defense of the very existence of the government."

**439.** In the Poggioli case (Ven. Arb. of 1903, 847, 870), damages having been claimed for the closing of a port with consequent injury to the commerce of the claimant, and it having been alleged that the reason for such closing was entirely insufficient, and that the port was closed simply as a matter of spite toward the claimants, the umpire remarked :

This may have been the case, but the umpire has nothing whatever to do with the reasons inducing the government to close the port. The umpire assumes that it was within its police power to close it, and no contract existing between the Poggiolis and the government (as in the Martini case), by virtue of which damages could be claimed for the closing of the port, the power of the government must be regarded as plenary and the reasons for its exercise beyond question.

**440.** In the Martini case (Ven. Arb. of 1903, 819, 843) the claimants had the right to possess the wharf of Guanta and to charge and receive port duties. The umpire considered that the contract under which the claimants were operating was based entirely "upon the theory that the port of Guanta was to be maintained as a port of at least the same degree of importance it then possessed. The contract is to be interpreted in the light of the surrounding circumstances, and one of the most significant of them was the importance of Guanta as a port of entry. It is not to be supposed that Lanzoni, Martini & Co.

received the contract with the idea that the government retained the power the following or any subsequent day to change its provisions, destroying or impairing the usefulness of the points of ingress and egress to and from the railways and mines. To allow the existence of such a power in the government as a contracting party, would be to give one of the parties to the contract the right to destroy all the interest of the other party in it." Nevertheless the umpire considered that the action of the government was entirely legal and within the power of the government as against the world at large, but on the condition that it make itself responsible to those who were under special contract relations with it.

**441.** The same doctrine was recognized in the *Company General of the Orinoco* case, French-Venezuelan Claims Commission under protocol of 1902 (Ralston's Report, 244, 360), it being said :

As the government of Venezuela, whose duty of self-preservation arose superior to any question of contract, it had the power to abrogate the contract in whole or in part. It exercised that power and canceled the provision of unrestricted assignment. It considered the peril superior to the obligation and substituted therefor the duty of compensation.

**442.** We discuss under the head of "War — Blockade" the want of right in the government to close by paper blockade ports within a revolutionary territory and in the hands of enemies.

**443.** In the *Faber* case (Ven. Arb. of 1903, 600) the right of national sovereignty over rivers used for international commerce received rather elaborate discussion, and it was the conclusion of the umpire that the rivers Zulia and Catatumbo, used for the conveyance of commerce from Colombia into Venezuela and thence to Maracaibo and the sea, could be closed to commerce by the sovereign power of Venezuela for whatever reason she might consider sufficient, the umpire concluding, after an extensive review of authorities, that "it seems that even in respect of rivers capable of navigation by seagoing vessels carrying oceanic commerce the weight of authority sustains the right of Venezuela to make the decrees complained of."

The whole subject was discussed in an article by Ernest Nys, published in the *Revue de Droit International et de Législation Comparée* (Vol. V, second series, 517), which article was largely used, although not expressly referred to, in connection with the discussion in this case.

**444.** So if a vessel be captured in neutral waters, it may not be made a prize, as was the opinion of the majority of the British Commission of 1871, case of the *Sir William Peel* (Hale's Report, 110;

Moore, 3935), and this irrespective of any question of complaint or intervention on the part of the neutral. It will be noted that under this view, had the British men-of-war been able to capture the brig *General Armstrong* at Fayal (Moore, 1071), such capture would have been entirely illegal under the law of nations, and an infringement upon the sovereignty of Portugal.

**445.** The Mexican-American Commission of 1868 held in the Ferrer case (Moore, 2720) that the owner of a cargo contained in a Mexican vessel, irrespective of his own national status, was entitled to be protected, the doctrine followed being that of freedom of goods in free ships.

**446.** It was held by the Alabama Commission (Moore, 655) that "the privilege of extritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality."

**447.** The relation between sovereignty and the right to fly the flag received much attention in the Mascate case between France and Great Britain before the Hague Permanent Court of Arbitration, and in the sentence in this case the following language was used :

Whereas generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants, and whereas therefore the granting of the French flag to subjects of his Highness the Sultan of Muscat in itself constitutes no attack on the independence of the Sultan, . . .

Whereas by Article 32 of this Act the faculty of the Signatory Powers to grant their flag to native vessels has been limited for the purpose of suppressing slave trading and in the general interests of humanity, irrespective of whether the applicant for the flag may belong to a state signatory of this Act or not, and whereas at any rate France is in relation to Great Britain bound to grant her flag only under the conditions prescribed by this Act;

Whereas in order to attain the above-mentioned purpose, the Signatory Powers of the Brussels Act have agreed in its Article 32 that the authority to fly the flag of one of the Signatory Powers shall in future only be granted to such native vessels, which shall satisfy all the three following conditions:

1. Their fitters-out or owners must be either subjects of or persons protected by the power whose flag they claim to fly;
2. They must furnish proof that they possess real estate situated in the district of the authority to whom their application is addressed, or supply a solvent security as a guarantee for any fines to which they may eventually become liable;
3. Such fitters-out or owners, as well as the captain of the vessel, must furnish proof that they enjoy a good reputation, and especially that they have never been condemned for acts of slave trade;

Whereas in default of a definition of the term "protégé" in the General Act of the Brussels Conference, this term must be understood in the sense which corresponds best as well to the elevated aims of the conference and its Final Act, as to the principles of the law of nations, as they have been expressed in treaties existing at that time, in internationally recognized legislation and in international practice;

Whereas the aim of the said Article 32 is to admit to navigation in the seas infested by slave trade only those native vessels which are under the strictest surveillance of the Signatory Powers, a condition which can only be secured if the owners, fitters-out, and crews of such vessels are exclusively subjected to the sovereignty and jurisdiction of the state under whose flag they are sailing;

Whereas since the restriction which the term "protégé" underwent in virtue of the legislation of the Ottoman Porte of 1863, 1865 and 1869, especially by the Ottoman law of 23 Sefer 1280 (August, 1863) implicitly accepted by the powers who enjoy the rights of capitulations, and since the treaty concluded between France and Morocco in 1863, to which a great number of other powers have acceded and which received the sanction of the Convention of Madrid of July 30, 1880, the term "protégé" embraces in relation to states of capitulations only the following classes: (1) persons being subjects of a country which is under the protectorate of the power whose protection they claim, (2) individuals corresponding to the classes enumerated in the treaties with Morocco of 1863 and 1880 and in the Ottoman law of 1863, (3) persons, who under a special treaty have been recognized as "protégés," like those enumerated by Article 4 of the French-Muscat Convention of 1844, and (4) those individuals who can establish that they had been considered and treated as "protégés" by the power in question before the year in which the creation of new "protégés" was regulated and limited, that is to say before the year 1863, these individuals not having lost the status they had once legitimately acquired;

Whereas the dispositions of Article 4 of the French-Muscat Treaty of 1844 apply only to persons who are *bona fide* in the service of French subjects, but not to persons who ask for ships' papers for the purpose of doing any commercial business;

Whereas the fact of having granted before the ratification of the Brussels Act on January 2, 1892, authorizations to fly the French flag to native vessels not satisfying the conditions prescribed by Article 32 of this act was not in contradiction with any international obligation of France; [the tribunal], for these reasons, decides and pronounces as follows: . . .

3. After January 2, 1892, France was not entitled to authorize vessels belonging to subjects of his Highness the Sultan of Muscat to fly the French flag, except on condition that their owners or fitters-out had established or should establish that they had been considered and treated by France as her "protégés" before the year 1863.

The court, in deciding a further question submitted to it, recited and held as follows:

Whereas the legal situation of vessels flying foreign flags and of the owners of such vessels in the territorial waters of an Oriental state is determined by the general principles of jurisdiction, by the capitulations or other treaties and by the practice resulting therefrom;



Whereas the terms of the Treaty of Friendship and Commerce between France and the Iman of Muscat of November 17, 1844, are, particularly in view of the language of Article 3: "Nul ne pourra, sous aucun prétexte, pénétrer dans les maisons, magasins et autres propriétés, possédés ou occupés par des Français ou par des personnes au service des Français, ni les visiter sans le consentement de l'occupant, à moins que ce ne soit avec l'intervention du Consul de France," comprehensive enough to embrace vessels as well as other property;

Whereas, although it cannot be denied that by admitting the right of France to grant under certain circumstances her flag to native vessels and to have these vessels exempted from visitation by the authorities of the sultan or in his name, slave trade is facilitated, because slave traders may easily abuse the French flag for the purpose of escaping from search, the possibility of this abuse, which can be entirely suppressed by the accession of all powers to Article 42 of the Brussels Convention, cannot affect the decision of this case, which must only rest on juridical grounds;

Whereas, according to the Articles 31-41 of the Brussels Act the grant of the flag to a native vessel is strictly limited to this vessel and its owner and therefore not transmissible or transferable to any other person or to any other vessel, even if belonging to the same owner; . . . [the tribunal], for these reasons, decides and pronounces as follows:

1. Dhows of Muscat authorized as aforesaid to fly the French flag are entitled in the territorial waters of Muscat to the inviolability provided by the French-Muscat Treaty of November 17, 1844;
2. The authorization to fly the French flag cannot be transmitted or transferred to any other person or to any other dhow, even if belonging to the same owner;
3. Subjects of the Sultan of Muscat, who are owners or masters of dhows authorized to fly the French flag or who are members of the crews of such vessels or who belong to their families, do not enjoy in consequence of that fact any right of extritoriality, which could exempt them from the sovereignty, especially from the jurisdiction, of his Highness the Sultan of Muscat.

#### DE FACTO GOVERNMENTS

**448.** The question as to what constitutes a government *de facto* (see also decision of the Franco-Chilean Commission, *supra*, Sec. 430) received some discussion in the Day case, United States and Venezuelan Claims Commission of 1889 (Report, 247), the commission citing with approval the case of *Mauran vs. Insurance Co.* (6 Wallace, 1), wherein Mr. Justice Nelson said, delivering the opinion of the court, that a government *de facto* was a government in possession of the supreme power of the district or country over which its jurisdiction extends; and *Thorington vs. Smith* (8 Wallace, 1), wherein one of the features by which a government *de facto* was discriminated was said to be "recognition by a foreign power." The city of *Bern vs. Bank of England* (9 Vesey, 347), cited in the same case, held that in England the courts would not take notice of a foreign government

not recognized by the government of Great Britain. The burden of proving that a particular government was the government *de facto* and that therefore responsibility should exist upon the nation for its acts, was held to rest upon the claimants.

449. In the Henriquez case (Ven. Arb. of 1903, 896) umpire Plumley said :

A *de facto* government which would give this claim a position before this commission must be one recognized as such for the republic of Venezuela, and not one temporarily in authority in a state or district under revolution and against the will and purposes of the *de jure* and *de facto* government of the nation.

The umpire cited with approval Austin, who spoke of a *de facto* government as one which presumably commanded the habitual respect and obedience of the bulk of the people, and Halleck, 127, as a government submitted to by the great body of the people and recognized by other states.

450. The true function of recognition as evidence of a *de facto* government, but not as in itself creating the *de facto* government, was indicated in the Cuculla case (Moore, 2876), Wadsworth, the Mexican commissioner concurring, saying :

Where, then, is the evidence of a *de facto* government? The possession of the capital will not be sufficient, nor recognition by the American Minister with or without the approval of his government. Recognition is based upon the pre-existing fact; does not create the fact. If this does not exist, the recognition is falsified. It may entail unpleasant consequences upon the power which improperly accords it, but cannot increase or diminish the rights or obligations of the other government struggling to maintain its supremacy.

451. In the case of Hanna before the British-American Claims Commission, in which all the commissioners united to decide that the United States was not responsible for the acts of the agents of the Confederate government, commissioner Frazer, in his opinion (Hale's Report, 239), laid great stress upon the fact that "her Britannic Majesty had recognized the so-called Confederate States as a belligerent and the contest of arms then prevailing as a public war. After such recognition by the sovereign, the subject of such sovereign cannot, in his character as such subject, aver that the fact was not so. The act of his government in that regard is conclusive upon him." He added, as bearing upon the question now under discussion, that "it is not the case of a government established *de facto*, displacing the government *de jure*. But it is the case merely of an unsuccessful effort in that direction, which, for the time being, interrupted the course of lawful government without the fault of the latter."

452. In the Jarvis case (Ven. Arb. of 1903, 150) recognition was held as of great weight in determining the existence of a *de facto* government, Bainbridge, commissioner, saying :

It is doubtless true that the question whether the Páez government was or was not the *de facto* government of Venezuela at the time the bonds were issued is one of fact. But the decision of the political department of the United States government on November 19, 1862, that there was no such conclusive evidence that the Páez government was fully accepted and peacefully maintained by the people of Venezuela as to entitle it to recognition must be accorded great weight as to the fact, and is in any event conclusive upon its own citizens.

Confirmation of the general view thus expressed is to be found in the Day case, *supra*, which quoted with approval the declaration of Justice Marshall :

When a civil war rages in a foreign nation, one part of which separates itself from the old-established government, the courts of the Union must view such newly-constituted government as it is viewed by the legislative and executive departments of the government of the United States (*United States vs. Palmer*, 3 Wheaton, 644 ; *Rose vs. Himely*, 4 Cranch, 272).

453. When a government ceases to be *de facto* and becomes one *de jure* is a question which also received consideration in the Day case, *supra*, the commission remarking :

It may also be said with great confidence that a government *de facto*, when once invested with the powers which are necessary to give it that character, can bind the state to the same extent and with the same legal effect as what is styled a government *de jure*. Indeed, as Austin has pointed out, every government, properly so called, is a government *de facto*. A government *de jure* but not *de facto*, says he, is that which was the government, and which, according to the view of the speaker, ought still to be a government, but in point of fact is not.

454. It will appear from our discussion as to the liability of governments for the acts of unsuccessful revolutionists, as well as from the citations given from the opinion of the Franco-Chilean Tribunal, *supra*, that an ineffective government of a revolution is neither *de facto* nor *de jure* to such a degree as will bind the nation by its acts. For the present we content ourselves with quoting the remark of Palacio, Mexican commissioner (Moore, 2892), in a concurring opinion, rejecting a claim for acts committed by the Confederacy, as follows :

It is, in my opinion, self-evident that in the present case there was not any aggressive and direct action on the part of the authorities of the United States ; because the authors of the fact, which has given origin to the claim, are neither *de facto* nor *de jure* authorities of the United States, nor of any of the states of the Union.

455. An unusual state of facts developed in the Guastini case (Ven. Arb. of 1903, 730). Here the revolution, afterwards unsuccessful, had through its local authorities levied and collected certain licenses. After their payment the regular governmental authorities reassumed possession of the district in which the licenses had been paid, and compelled a second payment. Ralston, umpire, held that money paid "to the *de facto* authorities in the shape of public dues must be considered as lawfully paid, and receipts given by them regarded as sufficient to discharge the obligations to which they relate. Any other view would compel the taxpayer to determine at his own peril the validity of the acts of those exercising public functions in a regular manner. We must apply to the facts before us the principle which would be invoked if the acting *jefe civil* had been illegally appointed or elected by legal authorities acting improperly. In such case no dispute could properly exist as to the right of the taxpayer to be protected by payment to such illegal but acting officer. . . . During the period for which taxes were collected by the revolutionary government, the legitimate government (as we may believe from the *expediente*) performed no acts of government in El Pilar. It did not insure protection, carry on schools, attend to the needs of the poor, conduct courts, maintain streets and roads, look after the public health, etc. The revolutionary officials, whether they efficiently performed these duties or not during the time in question, displaced the legitimate authorities and undertook their performance. The legitimate government therefore was not entitled at a later period to collect anew taxes once paid to insure the benefits of local government which it was unable to confer."

The umpire quoted and largely relied upon the case of the United States *vs.* Rice (4 Wheaton, 246), wherein the United States had attempted to collect customs duties at Castine, Maine, although at the time the goods were entered Castine was under the control of the English. He also cited, as following such precedent, Secretary Fish in writing to Mr. Nelson (Wharton's Digest of International Law, Vol. I, Sec. 7), Secretary Cass to Mr. Osma (*Ibid.*), and also Foreign Relations of 1899, 576.

456. Reference was incidentally made by Thornton, umpire, Jean-notat case (Moore, 3673), to the responsibility of a government *de jure* for acts which it had committed while but a government *de facto*, but the matter did not receive particular discussion by him. We shall hereafter see by other citations that a government is to be held responsible for its actions done while yet in a revolutionary stage.

RESPONSIBILITY OF GOVERNMENTS FOR THE ACTS OF A  
CONSTITUENT STATE

457. The measure of responsibility to which a general government may be held for the contracts of a constituent state depends upon the relations existing between the state and the general government. In the Nolan case (Moore, 3484) Thornton, umpire, conceived that such a claim did not come within the cognizance of the commission, saying that "it was a sort of contract, which the claimant voluntarily entered into with the state of Sinaloa, for which the Mexican government cannot certainly be held responsible."

458. In the Florida Bond case before the United States and Great Britain Claims Commission of 1853 (Report, 297; Moore, 3608) the umpire said :

For one portion of these bonds, the claimants contended that, by the right which Congress claimed to reject or veto any law passed by the legislative council of Florida, the United States government rendered itself liable to pay the interest and principal of these bonds should Florida fail to do so. . . . The first ground of claim [as above] need hardly be treated seriously; it might as well be contended that the British government is responsible for all the Canada debentures, because all the acts passed by the Canadian Parliament require the sanction of the home government before they become laws. It will be seen, however, that at the time these bonds were bought it was never imagined by the buyers that the United States were in any way liable. . . . It has been urged that there is no way of getting at a state government except through the government of the United States; this is a mistake. There is no difficulty in the way of individuals dealing with the separate states in any matters that concern the state alone; nearly all the states have public works and contract loans with individuals, American and foreign, and any person aggrieved may petition the governor or legislature for relief. A state cannot deal with a foreign government; the intercourse with foreign nations belongs to the general government.

459. On the other hand the relations between a government and a state may be so close that the state is to be treated merely as an arm of the general government and the government consequently held responsible for its acts. Thus in the Davy case (Ven. Arb. of 1903, 410) Venezuela was held responsible for the acts of officials of the state of Bolivar, Plumley, umpire, saying :

In Venezuela the states are carved out of the national domain by the national will and formed in accordance with the national wishes. Certain rights and privileges are granted to these states by the central government, while all not in terms granted, are necessarily reserved to and retained by the nation. . . . In the opinion of the umpire, there can be but one answer to this proposition, which is that there is responsibility on the part of Venezuela for the acts of its civil officers whether they in fact received their respective commissions direct from the

national government or indirectly and mediately through means and methods previously devised by the national government for the care and control of the state, county, or municipality to whom power had been delegated by the national government to make these appointments and issue commissions. The creator of these methods and means of internal administration, viz. the nation, must always be responsible to the other government for the creatures of its creation.

The same umpire in the Bolivar Railway case (Ven. Arb. of 1903, 388) expressed a like idea as follows :

The relation of the several states to the national government is of such intricate character, apparently so intimate, that it becomes difficult to discriminate rightfully between the two, if discrimination is possible in such matters. No question is made but that the service was performed in the interest of the state of Lara, and that it was proper service. The umpire knows that the several states are constituted by the national government and the governors are appointed by the national government and hold their offices during its pleasure ; that a certain income is set aside for the support of these state governments ; and from such knowledge as a basis in this regard, he is satisfied that, if this account is allowed against the national government and on behalf of the railway company, the national government has such a relation to the state of Lara that it may easily recoup the sum if it is not properly chargeable to it ; while if disallowed as against the railway company it is wholly remediless. It appears to the umpire, therefore, that it is safe for the national government and just and equitable to the company that the question should be resolved in favor of the railway company.

460. In the *Montijo* case (Moore, 1421, 1439), Mr. Robert Bunch had held as follows :

In his opinion the government of the Union has a very clear and decided connection with the debts incurred by the states of the Union [Colombia] toward foreigners whose treaty rights have been invaded or attacked ; and, secondly, that the debts so incurred by the separate states are in no way private, but, on the contrary, entirely public in their character. . . . In the event, then, of the violation of a treaty stipulation, it is evident that a recourse must be had to the entity with which the international engagements were made. There is no one else to whom application can be directed. For treaty purposes the separate states are non-existent ; they have parted with a certain defined portion of their inherent sovereignty, and can only be dealt with through their accredited representative or delegate, the federal or general government.

461. It is to be noted that the opinion of Plumley, umpire, in the Davy case, above cited, appears to be in closer conformity with the legal situation than that of Mr. Bunch, although a like result is reached ; Plumley, umpire, regarding the states as carved out of the national domain in Venezuela, as in fact they were as well in Colombia, while Mr. Bunch, umpire, speaks of the states as having parted with a certain defined portion of their inherent sovereignty. Mr. Bunch, therefore, seems, erroneously, as we think, to have

regarded the Colombian states as independent entities, as was the case with the colonies at the time of the formation of the American Union.

**462.** In the Beckman & Co. case (Ven. Arb. of 1903, 598) the same question arose before Duffield, umpire, who decided the dispute upon the strict ground of agency as follows :

It is argued by the commissioner for Germany that in any event the national government is responsible for the debt of one of its states, and in support of this contention is cited the very able opinion of Mr. Robert Bunch in the *Montijo* case [supra]. In the opinion of the umpire, it is not necessary in this case to decide the question. He prefers to put his opinion upon the concrete base, which is that in the efforts of Venezuela to suppress insurrection and put down rebellion she called upon the state of Zulia for assistance. In pursuance of this call, the state enforced the loans in question. It now finds itself either unable or indisposed to make any more payments to the creditors on this account. Under these circumstances, in the opinion of the umpire, it would be inequitable and unjust to the state of Zulia, as well as to the claimants, to remit the claimants to a suit at law against her. Morally and equitably, if not *stricto jure*, the government of Venezuela is bound to repay the state of Zulia these moneys which were advanced for the common defense of the nation. The citizens of the state of Zulia can properly be called upon to pay their quota of the national debt, but it is manifestly unjust to assess upon them the entire amount of these forced loans, and absolve the other citizens of the republic of Venezuela from the payment of their own proportion thereof.

**463.** Although, as may be inferred from the citations given, at least two Venezuelan commissioners had, in the British and German commissions, contended that the general government was not liable for the debts of a Venezuelan state, nevertheless in the Ballistini case (Ven. Arb. of 1903, 503), Paúl, Venezuelan commissioner, delivering an opinion in the conclusions of which the French commissioner joined, allowed an award against Venezuela for a certificate issued in favor of the claimant by the general internal treasurer of the state of Bolivar, recognizing the debt against the old state of Guayana for supplies furnished to it on the order of its President.

#### RESPONSIBILITY FOR ACTS OF MUNICIPALITIES

**464.** In the Thompson case (Moore, 3484) the commissioners of the Mexican-American Commission under the convention of 1868 rejected a claim for a debt due from a municipal corporation of Mexico on the ground that the government of Mexico was not obliged to pay the debts due from or by its cities and villages, or their inhabitants.

**465.** In the Thomson-Houston International Electric Company case (Ven. Arb. of 1903, 168), Paúl, commissioner, held that the contract claimed to be violated having been between claimant and a

municipality of Venezuela, it could not be "understood why said company pretends to claim from the national government the payment of the balance of a current account kept with a municipality of one of the federal states whilst the interested parties kept in activity the credit and debit of their account."

**466.** Bainbridge, commissioner, of the same commission, speaking for himself and his associate in the *La Guayra Electric Light and Power Company* case (Ven. Arb. of 1903, 178), held that no evidence had been introduced to fix liability by reason of special legislation or administrative control exercised by the national government over the municipality, and considered that the argument in favor of responsibility overlooked the dual character of municipal corporations, the one governmental, legislative, or public, the other proprietary or private, and said that "those matters which are of concern to the state at large, although exercised within defined limits, such as the administration of justice, the preservation of the public peace, and the like, are held to be under legislative control, while the enforcement of municipal by-laws proper, the establishment of gas works, waterworks, construction of sewers, and the like are matters which pertain to the municipality as distinguished from the state at large." He held, therefore, that "in order to bring this claim within the jurisdiction of the commission, it was, in our judgment, incumbent upon the claimant to show a sufficient excuse for not having made an appeal to the courts of Venezuela open to it, or a discrimination or denial of justice after such appeal had been made. As the claim stands it is merely a dispute between a citizen of the United States and a citizen of Venezuela in regard to their respective rights under the terms of a certain contract."

**467.** In the two *Bensley* cases, brought before the commissioners under the treaty of 1849 between the United States and Mexico (Moore, 3016, 3017), responsibility for the acts of a municipality was denied, it being said in the first case :

There is no allegation that the acts complained of were perpetrated by any officer or person in the employment or under the control of the Mexican government, or for whose proceedings that government was or ought to be responsible. The injury sustained by the memorialist, as set forth by him, was inflicted by a municipal officer of the village of Dolores, against whom redress might have been had before the judicial tribunals of the country.

In the second case it was said :

The acts complained of were committed by a municipal officer of the department for whose conduct the government of Mexico cannot be held responsible



unless done by its authority. It would be an extraordinary position to assume under the law of nations that the government is liable to afford an indemnity for every injury which may result from the illegal or irregular acts of any of its subordinate municipal officers.

#### THEORY OF RESPONSIBILITY OF GOVERNMENTS FOR THE ACTS OF THEIR OFFICERS

**468.** The theory upon which a state may be held responsible for the acts of its officers, and the limitations upon such responsibility, were discussed at large by Andrade, Venezuelan commissioner, in the *de Brissot* case (Moore, 2949, 2952). He said :

The responsibility of governments, in general, for damages caused to foreigners is founded on the ground that the state being a moral person endowed to a certain degree with the same capacity and liberty as are enjoyed by the citizens who compose it, is bound as such to account for its own acts when they cause some injury to another state, or to the citizens of another state. For the same reason it is held bound to indemnify the damages caused by the persons under its dependence, and for whom it is accountable. But in the state a double juridical person is to be recognized — the civil person, inasmuch as it is the possessor of its patrimony and has the capacity to administer it, and the political person, so far as it is a political, independent, and sovereign entity charged with the preservation of the public order and the protection of the citizens. Considered in the first aspect, its responsibility toward the foreigners damaged or injured by the acts of its officers is purely moral, and only in the case of complicity, or of manifest denial of justice, could it become international. In this aspect it is contemplated by Cushing, when, speaking of the two classes of officers employed in the administration of public affairs, he says : " But for the acts of the latter, no government holds itself pecuniarily responsible. It provides means to make them personally responsible, or to punish them for malfeasance in office, and in so doing it does all which the people have by their constitution and laws required of the government." . . .

Fiore and Calvo concur in subordinating it to four conditions, to wit : (1) That the government may have known in due time to prevent it, the illegal act which its officers intended to commit, and did not prevent it. (2) That it, having been enabled to revoke in time the act of its officer, did not revoke it. (3) That the ignorance of the act intended by the officer may, by its circumstances, be judged as malicious or criminal. (4) That having been advised of the facts, it had not pressed itself to blame the acts of its agent, nor to take the proper measures to prevent in future the repetition of the same faults.

The Venezuelan commissioner held, as consequent upon his reasoning, that the legal president of the state of Apure was responsible only to the legislature of the said state, and that the federal government had not the legal power to punish him or even to treat him as a rebel except by the law of war when it had subdued him by force. In the same case, Little, commissioner (Moore, 2968), held that

"Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could reasonably be required in that behalf, she is to be held blameless; otherwise not."

#### WHEN RESPONSIBLE FOR THE ACTS OF CIVIL OFFICIALS OR AUTHORITIES

**469.** The responsibility of governments for the acts of their officials has received much consideration at the hands of the more recent commissions. In the Poggioli case (Ven. Arb. of 1903, 847) the umpire of the Italian-Venezuelan Commission referred to the De Zeo case (Ven. Arb. of 1903, 693), and also to the case of Johnson (Moore, 3032), in which the Mexican government had been charged with tolerating and even setting on foot disorders affecting the claimant's business, and it was said: "So grave a charge against the government of any country should be maintained by the most unquestionable proof. It should be alleged as a distinct fact and ground of reclamation and proved by evidence of the clearest character." He also discussed the Bensley case (Moore, 3018), in which it was said that the government of Mexico could not be held liable on account of the wanton or malicious trespass of the person holding the office of governor of one of the states constituting the confederacy, and the Cahill case (Moore, 3066), where the claimant sought payment for damages suffered by him while conducting a drug store at Cardenas, Cuba, and for the breaking up of his business (all of which he attributed to the machinations of a rival druggist who was also an official, a subdelegate of pharmacy), and where the arbitrators dismissed the claim. The umpire in addition referred to Calvo (Sec. 1263), Bonfils (Sec. 330), Creasy (343), Halleck (Chap. XI, Sec. 7), and Hall (227, fourth edition). He continued:

One cannot consider that the acts [complained of in the Poggioli case] were the acts of a well-ordered state, but rather that for the time being some of the instrumentalities of government had failed to exercise properly their functions, and for this lack the government of Venezuela must be held responsible. . . . Reviewing the authorities, it seems to the umpire that this case differs from those cited from Moore's Arbitrations, in that it is sustained by the clearest proof following distinct allegations, and that there has been in fact a denial of justice by the administrative authorities of the state; that the considerations herein narrated come within the language of Calvo, who finds responsibility "in case of complicity or of manifest denial of justice," for there certainly was complicity on the part of the officials and denial of justice as set out; that the criterion suggested by Bonfils was exactly met by the administrative refusal to grant relief when the local

government failed to take ordinary and necessary precautions and allowed the offenses complained of to go unpunished after becoming known; that the state of Los Andes, during the years in question, in the language of Creasy, was "habitually and grossly careless and disorderly in the management of its own affairs"; that by its failure to make reparation or punish the guilty, Venezuela has, through the fault of Los Andes, rendered itself "in some measure an accomplice in the injury" and has become "responsible for it," and that, according to Hall, the acts complained of being "undisguisedly open and of common notoriety" and being of importance, the state "is obviously responsible for not using proper means to repress them," and has not inflicted "punishment to the extent of its legal powers."

In this case it appeared that an attempt had been made upon the life of one of the claimants by four men, subsequently recruited into the Venezuelan army, and who had never been punished, although their guilt appeared to have been completely established, and although repeated requests therefor had been made of the higher officials within two weeks after the wrongful arrest of the claimants. Further, the fact appeared that these same men were then engaged in ravaging claimants' property and driving off their employees; that notwithstanding express orders, given by the national government, the said authorities failed to make the arrests in connection with which the umpire said that the local authorities were guilty of a denial of justice, for justice may as well be denied by administrative authority as by judicial (New Granadian Passenger Tax, 13 Opinions Attys. Gen., 547).

470. In the Baldwin case, before the Mexican-American Commission of 1839 (Moore, 3235), it appeared that the claimant had been the victim of repeated prosecutions at the hands of judicial and administrative authorities, which prosecutions failed, however, in the upper courts. The Mexican commissioners contended that where an American citizen voluntarily placed himself under the municipal laws of another country, he must take them as they were, and that he had no greater right to complain than the Mexicans themselves if the laws should be bad and imperfectly administered. The American commissioners urged, however, that what oppression governments might practice upon their citizens was one thing, the practice of similar oppressions upon foreigners was another, and that the latter had the right to appeal for the protection of their government if injured. The umpire made an award in favor of the claimant. Another award was made to the same claimant for personal ill-treatment by authorities apparently unatoned (Moore, 3239).

471. In the Morrill case (United States and Venezuelan Claims Commission of 1889, Report, 37) Venezuela was acquitted of

responsibility for the wrongful acts of her subordinates, the position taken being covered by the following language :

There is not the slightest evidence in the record that we can discover which shows any malice or bad feeling toward the captain by the authorities of Venezuela. If some subordinate agents of hers, for personal grievances of their own, conceived a dislike for him, and determined to convert a breach of their official duty toward the government into the means of punishing him and gratifying their private malice, there is no principle we can conceive of on which the government could be held responsible for a wrong done to it as well as to him, unless in some way it is connected with that wrong by authorization or adoption.

472. In the Moses case (Moore, 3127) it was alleged by the Mexican agent that the wrongful seizure of claimant's goods was a matter for judicial investigation, and that the owner failed to pursue the proper legal remedies under the laws of Mexico. Further, that the injury was done by subaltern or inferior authorities; and that the owner, having failed to make reclamation on the supreme government of Mexico, could not present his claim before the commission. Lieber, umpire, in his decision said : " Joseph Moses was a citizen of the United States when a Mexican officer deprived him of his goods. An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority." He therefore made an award in favor of the claimant.

473. Nevertheless, a respondent government may not always be held liable for the acts of inferior judicial authorities, and it was so held by Thornton in the *Caroline B. Slocum* case (Moore, 3140):

With regard to the conduct of the prefect in ordering the imprisonment of the claimant, she had it in her power to proceed against him in a higher court and to hold him to account for it, if it was illegal. But the umpire is of the opinion that the Mexican government cannot be held responsible for such acts of inferior authorities, and he therefore awards that the above-mentioned claim be dismissed.

The same rule was followed by this umpire in the Blumhardt case (Moore, 3146), he saying :

The umpire is of opinion that the Mexican government cannot be held responsible for the loss occasioned by the illegal acts of an inferior judicial authority, when the complainant has taken no steps by judicial means to have punishment inflicted upon the offender and to obtain damages from him. The umpire does not believe that the government of the United States, or of any nation in the world, would admit such a responsibility under the circumstances which appear from the evidence produced on the part of the claimant, showing that Judge Alvarez was the person to blame in the matter, and that it was against him that proceedings should have been taken.

Again, in the Smith case (Moore, 3146) Sir Edward Thornton remarked :

If Judge Aldrete acted illegally in the matter, the umpire is of opinion that the claimant ought to have endeavored to obtain justice and damages against the judge from a higher Mexican court of justice, and that the Mexican government cannot be held responsible for the illegal acts of inferior judicial authorities when no appeal has been made to a higher court.

The same umpire, however, in the Bronner case (Moore, 3134) found that the decision had been so unfair as to amount to a denial of justice, the claimant having taken more than the usual precautions with a view to prevent the possibility of accusations against him.

474. In the Leichardt case, Wadsworth, American commissioner (Moore, 3134), found that where there was a fair prospect of obtaining justice by due course of law for wrongs and injuries inflicted by private persons or by petty officers, like the governor's secretary, there must be a resort to the courts of the country, and in such case appeal to the claimant's national authority only when the courts of the country failed to do their duty or misconceived it or perverted justice.

In the same commission, Lieber, its first umpire (Moore, 3131), had followed a like rule in the Selkirk case.

But in the Garrison case (Moore, 3129) the claim was entertained, an appeal from the judge to a Mexican court of appeal being prevented by intrigues or unlawful transactions.

However, in the Donoughho case (Moore, 3012, 3014), wherein a demand was made for damages because of the death of Donoughho as the result of the action of what was called a *posse comitatus*, Thornton, umpire, said :

The attack made upon the house was not the orderly proceeding of authorities, but the riotous behavior of a mob, and after a careful examination of the voluminous but extremely contradictory evidence of the affair, the umpire is of the opinion that the disastrous consequences of that night were entirely due to the improper conduct of the authorities on the occasion ;

adding : " It cannot be supposed that the claimants in the above-mentioned claim would have been able to obtain justice in any action for damages which they might have instituted against Salazar."

475. In the Ruden case (Moore, 1653) it was shown that the inhabitants of Motupe had invaded the claimant's plantation and burned his buildings and fences ; that he had appealed to the executive power and demanded an indemnity, charging guilty omission on the part of the authorities ; that such appeals and repeated subsequent ones met

with no relief, — the facts were not investigated nor the guilty parties prosecuted ; that an order was given for an investigation, but it was avoided ; that the judicial authorities, when appealed to for an investigation, refused to entertain it on the ground that an executive order had forbidden a trial of suits against the treasury ; and while justice was thus denied, it was charged that the local authorities were concerned in the attack on the plantation. A report of the consular body, drawn up at the place, declared that the burning of estates, both native and foreign, at the time and place in question, was committed by armed forces under the command of officers. On all these grounds the umpire held Peru liable for the burning.

476. In the Johnson case (Moore, 1656) the claimant's property was destroyed, and he was personally and permanently injured by armed bands headed by the governors of adjacent towns, instigated by the superior authorities of the province, who were dependent upon and immediately represented the supreme government. The supreme government issued a decree to the effect that the injuries should be redressed, but nothing substantial was done, nor any of the malefactors punished. The Peruvian commissioner had contended that it was necessary that Johnson should have had recourse to the courts and been denied justice, but it was known that the judges of the province of Lambayeque were menaced and controlled by the mob, and, if not in sympathy with them, in a panic, and that it would have been useless to appeal to them. Mr. Elmore, the umpire, declared that there had been an actual denial of justice. By the circular of the Minister of Justice of Peru the judges were forbidden to receive *expedientes* affecting the law of December 25, 1851, concerning the consolidation of the public debt, the circular also closing the courts against the sufferers at Lambayeque. Mr. Elmore cited two cases of the actual denial, on the ground of the circular referred to, of petitions of persons injured in Lambayeque. One of these was the case of Ruden. The claimants were thus without hope, for if they applied to the courts, they were told they had no remedy ; if they applied to the commission, they were told they must apply to the courts. An award was therefore made in favor of the claimant.

477. But it appears that a respondent government is not to be held liable in all instances for slight infringements upon the rights of a foreigner, for which, at any rate, the offenders have been punished. In the Pierce case (Moore, 3252), before the Mexican-American Commission of 1868, it appeared that the claimant was arbitrarily arrested by an officer of local police in Mexico, and kept all night a prisoner

in a house, but that the authorities had proceeded against this official, fined and reprimanded him, and dismissed him from office. Under these circumstances an award was refused.

So in the Forrest case (United States and Venezuelan Claims Commission of 1889, 29) the commission cited with approval the opinion of Attorney-General Akerman, given in 1871 on the case of alleged corruption of a municipal judge of Brazil in authenticating and ratifying the report of a board of surveyors, he saying (13 Opinions Attys. Gen., 553):

Even if the charge of corruption were established, which does not appear to be the fact, I am of opinion that the Brazilian government would not be responsible. The misconduct violated no treaty stipulations between Brazil and the United States. It did not benefit the public treasury of the country, but was in aid of a private interest.

The commission also in this case cited with approval the opinion of Honorable Caleb Cushing in his letter to Mr. Osma, hereinbefore referred to, accepting as a principle of international law "well recognized by civilized nations, that governments are not ordinarily, at least, held to be responsible, pecuniarily, for the acts of their officers in the exercise of their public duties."

**478.** Responsibility does not extend to the method of procedure of local courts, for, as was held by the umpire in the Cotesworth & Powell case (Moore 2083), "no demand can be founded, as a rule, upon mere objectional *forms* of procedure or the *mode* of administering justice in the courts of a country; because strangers are presumed to consider these before entering into transactions therein. Still, a plain violation of the substance of natural justice, as, for example, refusing to hear the party interested, or to allow him opportunity to produce proofs, amounts to the same thing as an absolute denial of justice."

**479.** In the Steamer *Warren* case (Moore, 3132), before the Mexican-American Claims Commission of 1868, Wadsworth, speaking for the commission, held that where a vessel had been seized in Mexico by the proper officers and libeled in a court of competent jurisdiction on the charge of violating the revenue laws, and after a full and fair hearing and a strenuous defense on the part of the owners of the vessel, the court decreed confiscation, the owners being present and announcing to the court their determination not to appeal, there being in the opinion of the commission sufficient evidence in the record to sustain the decision of the court, he would be rash who should affirm that "it was plainly wrong *in re minime dubia*."

**480.** In the case of *Barron, Forbes & Co.* (Hale's Report, 164; Howard's Report, 83; Moore, 2525), where error was set up on the part of the Supreme Court of the United States and inferior tribunals, the commission held unanimously that this was insufficient, and disallowed the claim.

**481.** In the *Sambiaggio* case (Ven. Arb. of 1903, 666) it was said :

The ordinary rule is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for which is expressly assumed by it. To apply another doctrine, save under certain exceptional circumstances incident to the peculiar position occupied by a government toward those subject to its power, would be unnatural and illogical.

Language the same in spirit was used by Plumley, umpire, in the *Henriquez* case, before the Netherlands-Venezuelan Commission (Ven. Arb. of 1903, 896), he saying :

The umpire has already held in the case of *James Crossman vs. the Republic of Venezuela* [Ven. Arb. of 1903, 298] in the British Mixed Commission, now sitting in Caracas, that to hold the government of Venezuela responsible for seizure of goods or property, it must be made by the Venezuelan government through its proper authorities or by those who had a right to act in the name of or in behalf of the government of Venezuela; that it must be done by some one having authority to express the governmental will and purpose.

**482.** In the line of the authority just quoted and as holding a respondent government to responsibility for acts as assumed by it, is the case of *Jonan* (Moore, 3251), in which Thornton, umpire, said :

It appears to the umpire that the arrest of the claimant in December 1853 was illegal in form; that almost the whole of the accusations against him were not within the jurisdiction of the Mexican courts; . . . that the fact of their trying claimant upon accusations over which they had no jurisdiction prolonged the proceedings most unjustly toward the claimant; that from the beginning to the end of the proceedings the forms of law were infringed to the prejudice of the accused; that the legation of the United States at Mexico called the attention of the Mexican government to the want of jurisdiction of the tribunals over the questions at issue, and that the Mexican government having been thus warned, and having abstained from attempting to prevent these illegal acts, which it had full power to do, assumed the responsibility of those acts.

**483.** It was likewise held in the *Maal* case (Ven. Arb. of 1903, 914) that "since there is no proof or suggestion that those in discharge of this important duty of the government of Venezuela have been reprimanded, punished, or discharged, the only way in which there can be an expression of regret on the part of the government and a discharge of its duty toward the subject of a sovereign and



friendly state is by making an indemnity therefor in the way of money compensation."

484. In the Cesarino case (Ven. Arb. of 1903, 770) the deceased (whose heirs presented a claim for his death) had been shot by a police officer of the Venezuelan government, the killing being entirely causeless, but deliberate, and apparently not in the pursuit of any private vengeance. Umpire Ralston said :

Cases before the present commissions in Caracas afford many illustrations of decisions holding the government of Venezuela liable for the wanton or negligent acts of its agents in war and in peace, and, in the judgment of the umpire, the present claim should be added to the list of such cases.

485. In the Sibley case (Mexican-American Commission of 1839, Moore, 3045) the American brig *Industry* had been seized and detained, and her master imprisoned by the Mexican authorities for the purpose, as the claimants alleged, of extorting money. The commissioners agreed that an award was due, differing only as to the amount, which was subsequently fixed by the umpire.

486. While, as we have seen, a government is held responsible for the acts of its agents, nevertheless the rule laid down in Hall, 226, and quoted with approval in the Metzger case (Ven. Arb. of 1903, 578) and in the Gage case (Ibid., 164), must not be lost sight of.

Presumably, therefore, acts done by them are acts sanctioned by the state, and until such acts are disavowed, and until, if they are of sufficient importance, their authors are punished, the state may fairly be supposed to have identified itself with them. Where, consequently, acts or omissions, which are productive of injury in reasonable measure to a foreign state or its subjects, are committed by the persons of the classes mentioned, their government is bound to disavow them, and to inflict punishment and give reparation when necessary.

487. In the Christern case, however (Ven. Arb. of 1903, 520), a limitation upon the broad rule was suggested, the umpire saying :

There is much force in the argument of the commissioner for Germany that the government, as a principal, is presumed in law to have knowledge of all the acts of its officers, as its agents, and if the case was one between private parties it would be difficult to avoid the conclusions drawn by him. The umpire is of the opinion, however, that as to claims against governments it would be unjust to enforce so strict a rule of agency. Of necessity a national government must act through numerous officials, many of whom are very subordinate and quite remote from the seat of government. In the ordinary course of business a creditor under a contract, or a party injured by a tort, presents his claim to the central powers of the government and asks satisfaction thereof from some official whose special function it is to represent the government *in the premises*.

The only question, however, before the umpire, in connection with which this decision was made, was as to the person against whom a demand should be made in order to start the running of interest against the government.

488. Where customhouse officials have unjustifiably refused to clear vessels, their government has been held responsible, and so it was in the case of *Lalanne* (Ven. Arb. of 1903, 501) and in the *Ballistini* case (*Ibid.*, 503). But where doubtful transactions have been entered into between importers and customhouse officers, the government was held entitled to a reasonable time to investigate the matter and to demand security for the payment of duties in the meantime (*Clay, Administrator, Moore, 2872*).

The Chilean Commission of 1892 held the United States responsible for the employment of a Chilean attorney by the American Minister in an extradition case, such employment under the circumstances being considered within the natural scope of his powers (*Trumbull case, Moore, 3569*).

#### RESPONSIBILITY OF GOVERNMENTS FOR THE ACTS OF PRIVATE INDIVIDUALS

489. To a large degree we have discussed this subject in considering the responsibility of governments for the acts of their minor officials, because, in the first place, the minor official who uses his office, not for the purpose of carrying out the functions confided to him, but to further his private revenges or his personal interests, becomes to that extent not the agent of the government, but merely the private citizen; and further because, when a government is held responsible for the lapse of officials in not bringing about the punishment of such individuals who have infringed upon the rights of the foreigners, it is for the reason that by such remissness the government, acting or failing to act through its organs, is to be treated as assuming as its own the wrong committed by its citizen, and therefore becomes internationally liable. We are therefore prepared to accept the following rule laid down by the umpire in the *Cotesworth & Powell* case (*Moore, 2082*):

One nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them. It then becomes a public concern, and the injured party may consider the nation itself the real author of the injury [*Vattel, Book I, Sec. 162*]. And this approval, it is apprehended, need not be in express terms; but may fairly be inferred from a refusal to provide means of reparation when such means are possible; or from its pardon of the offender, when such pardon necessarily deprives the injured party of all redress.

**490.** In the de Brissot case (United States and Venezuelan Claims Commission, Report, 457; Moore, 2968), in Little's opinion, it was said that: "Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could reasonably be required in that behalf, she is to be held blameless; otherwise not."

This was so also in the case of Glenn, Thornton, umpire (Moore, 3138), holding that there was a denial of justice in the failure to bring to trial those who committed the act of violence, so that their guilt or innocence might have been established.

**491.** A government is not to be held responsible for the acts of savages not reduced to control. In the Wipperman case (United States and Venezuelan Claims Commission of 1889, Report, 134) it is said :

There can be no possible parallel between the case of a consul residing in a large city inhabited by civilized people, whose house is deliberately invaded in open day, and whose property is pillaged or destroyed by acts of violence, aimed at him in his official capacity and accompanied with studied insults to the government he represents, and all proceeding from a riotous body of persons who, presumably, at least, ought to have been within the preventive or restraining power of the police or the military, and the accidental injury suffered by an individual in common with others, not in his character as consul, but as a passenger on a vessel which has been unfortunate enough to be stranded on an unfrequented coast, subject to the incursions of savages, which no reasonable foresight could prevent. . . .

Unless a government can be held to be an insurer of the lives and property of persons domiciled within its jurisdiction, there is no principle of sound law which can fasten upon it the responsibility for indemnity in cases of sudden and unexpected deeds of violence, which reasonable foresight and the use of ordinary precautions cannot prevent. Of course, if a government should show indifference with reference to the punishment of the guilty authors of such outrages, another question would arise, but as long as reasonable diligence is used in attempting to prevent the occurrence or recurrence of such wrongs, and an honest and serious purpose is manifested to punish the perpetrators, the best evidence of which, of course, will be the actual infliction of punishment, we fail to recognize any dereliction in the performance of international obligations, as measured by any practical standard which the good sense of nations will permit to be enforced.

So also the Mexican government was acquitted of responsibility for the acts of Kickapoo Indians from Mexico seizing live stock in Texas, Thornton, umpire, coinciding in the apparent opinion of both commissioners (Moore, 3038), and believing the authorities had not failed in furnishing reasonable protection against or in endeavoring to punish the Indians.

RESPONSIBILITY OF THE GOVERNMENT FOR THE ACTS OF  
SUCCESSFUL REVOLUTIONISTS

492. That the nation is responsible for the acts and contracts of revolutionists who succeed in overturning the prior government, and establishing themselves in power, has been fully recognized by commissions; the theory invoked being that, the revolutionists having succeeded, their acts from the beginning are rightfully to be considered as those of a titular government, and the final triumph of their authority should properly be given a retroactive effect, confirming and ratifying antecedent steps. (We refer particularly to citations from Opinion of Franco-Chilean Commission, ante, Sec. 430.) This question arose before the Peruvian Claims Commission (Moore, 1655), in which, the commissioners disagreeing, the umpire allowed to Hill, claimant, an award for personal ill treatment at the hands of the revolutionary party which subsequently became the government, rejecting the demand for money belonging to the claimant, and of which he had been robbed.

493. So in the case of the Bolivar Railway Co. (Ven. Arb. of 1903, 388), Plumley, umpire, said:

The nation is responsible for the obligations of a successful revolution from its beginning, because, in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful result. . . . Success demonstrates that from the beginning it was registering the national will.

He quoted with approval the rule laid down in the case of *Williams vs. Bruffy* (96 U. S., 176), wherein the court held, referring to the case where a portion of the inhabitants had separated themselves from the parent state and established an independent government, that "the validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation."

This opinion the same umpire followed in the case of the Puerto Cabello and Valencia Railroad Co. (Ven. Arb. of 1903, 455). The same gentleman, when occupying a like position in the French-Venezuelan Commission under the protocol of 1902 (Ralston's Report, 367, 451), said in the case of the French Company of Venezuelan Railroads:

The injuries done the railroad, the buildings and the material, by use in war, must have been considerable, and since the revolution was successful, the respondent government is properly chargeable for its use and for the injuries and damages

which resulted. There is no question as to the liability of the respondent government for the natural and consequential damages which resulted to the railroad properties while they were in the use and control of the titular government. Hence there is unquestioned and complete responsibility on the part of the respondent government for all the necessary, natural, and consequential injuries which resulted to the railroad and its properties when used by either the revolutionary or the governmental forces.

494. In the Dix case (Ven. Arb. of 1903, 7), Bainbridge, commissioner, speaking for the commission, said :

The revolution of 1899, led by General Cipriano Castro, proved successful, and its acts, under a well-established rule of international law, are to be regarded as the acts of a *de facto* government. Its administrative and military officers were engaged in carrying out the policy of that government under the control of its executive. The same liability attaches for encroachments upon the rights of neutrals in the case of a successful revolutionary government, as in the case of any other *de facto* government.

In the Heny case (Ven. Arb. of 1903, 14) the same commissioner used almost identical language, — the case, however, going to the umpire, Barge, who recognized the principle of responsibility, saying (page 22) that "the revolution proved ultimately successful in establishing itself as the *de facto* government, so that the liability of the Venezuelan government for these acts cannot be denied."

#### LIABILITY OF GOVERNMENT FOR ACTS OF UNSUCCESSFUL REVOLUTIONISTS

495. A much more troublesome question arises when it is sought to hold the titular government responsible for the acts of a revolution which has not met with success, and in the commencement of the consideration of this subject we call attention to the recommendations of the Institute of International Law at its session of September 10, 1900, referred to and relied upon by Agnoli, Italian commissioner, in the Guastini case (Ven. Arb. of 1903, 730) :

1. Independently of cases where indemnity may be due foreigners in virtue of the general laws of the country, foreigners have right to indemnity when they are injured in their person or property in the course of a riot, an insurrection, or a civil war ; (a) when the act through which they have suffered is directed against foreigners as such, in general, or against them as subject to the jurisdiction of any given state ; or (b) when the act from which they have suffered consists in the closing of a port without previous notification at a seasonable time, or the retention of foreign vessels in a port ; or (c) when the damage results from an act contrary to law committed by an agent of the authority ; or (d) when the obligation to indemnify is founded in virtue of the general principles of the laws of war.

2. The obligation is likewise established when the damage has been committed (No. 1 (a) and (d)) on the territory of an insurrectionary government, either by said government or by one of its functionaries. Nevertheless, demands for indemnity may in certain cases be set aside when they are based on acts which have occurred after the state to which the injured party belongs has recognized the insurrectionary government as a belligerent power, and when the injured party has continued to maintain his domicile or habitation in the territory of the insurrectionary government. So long as this latter is considered by the government of the injured party as a belligerent power, claims contemplated in line 1 of Article 2 may be addressed only to the insurrectionary government, not to the legitimate government.

3. The obligation of indemnity ceases when the injured parties are themselves the cause of the events which have occasioned the injury.

There is evidently no obligation to indemnify those who have entered the country in contravention of a decree of expulsion, or those who go into a country or seek to engage in trade or commerce, knowing, or who should have known that disturbances have broken forth therein, no more than those who establish themselves or sojourn in a land offering no security by reason of the presence of savage tribes therein, unless the government of said country has given the emigrants assurances of a special character.

4. The government of a federal state composed of several small states represented by it from an international point of view, cannot invoke, in order to escape the responsibility incumbent on it, the fact that the constitution of the federal state confers upon it no control over the several states, or the right to exact of them the satisfaction of their own obligations.

5. The stipulations mutually exempting states from the duty of extending their diplomatic protection must not include cases of a denial of justice, or of evident violation of justice, or of the *jus gentium*.

#### *Recommendations*

1. The Institute of International Law expresses the hope that states will refrain from inserting in their treaties clauses of reciprocal irresponsibility. It believes that such clauses are wrong in that they relieve the states from the duty of protecting the foreigner in their territory.

It believes that states which, through a series of extraordinary circumstances, do not feel themselves to be in a position to insure in a sufficiently effective manner the protection of foreigners on their territory cannot withdraw themselves from the consequences of such a state of things except by a temporary interdiction of their territory to foreigners.

2. Recourse to international commissions of inquest and international tribunals is, in general, recommended for all causes of damages suffered by foreigners in the course of a riot, an insurrection, or a civil war.

**496.** This question received consideration before the Mexican Commission of 1868 in the Schultz case (Moore, 2973), Wadsworth, speaking for the commission, holding:

There could be but one sovereign power in the same political community at the same time. The United States having determined for itself, and according to the

well-sustained fact, in what Mexican authorities this sovereignty resided, and maintaining to this day political and amicable relations with it as the only government in Mexico, cannot now claim that another government existed in that country. If such inconsistent positions moreover were allowable, we have decided that the Zuloaga and Miramón pretensions in Mexico never reached the sovereignty nor constituted the government *de facto*; their movement being always only an attempt to displace the constitutional government, which ultimately and signally failed.

497. In the Wyman case, Thornton, umpire (Moore, 2978), said :

If, therefore, the declarations of the claimant as to his losses be strictly true, it would undoubtedly be one of those misfortunes which, deplorable as they may be, occur in times of revolution and intestine disturbances, but which cannot be laid to the charge of the Mexican government; neither would it be justifiable to condemn that government to compensate the claimant for losses arising out of the rebellious misdeeds of General Martinez against which Governor Rubi was obliged to defend himself; nor does it appear that during this defense the latter did any wanton mischief to the property of the claimant.

So in the Walsh case (Moore, 2978) the same umpire refused an award for the acts of a rebel authority, and the same principle was followed in the Burn, Frazier, and Blumenkron cases (Moore, 2978), in the Silva case (Moore, 2979), and in the Devine case (Moore, 2981).

498. In the Spanish Commission (McGrady case, Moore, 2982) the claim was for "wrongs and injuries by bodies of insurgents in arms against the authorities of Spain and endeavoring to overthrow the government thereof in the island of Cuba." A demurrer being filed for Spain, the arbitrators sustained it and dismissed the claim. The same course was followed in the Zaldivar case before the same commission (Moore, 2982) and in the Cummings case (Moore, 2976).

499. The question received careful examination in the Hanna case before the British-American Claims Commission (Hale's Report, 56; Moore, 2982, 2985; Howard's Report, 57, 512, 524), the award being as follows :

The claim is made for the loss sustained by the destruction of cotton belonging to the claimant by men who are described by the claimant as rebels in arms against the government of the United States. The commissioners are of opinion that the United States cannot be held liable for injuries caused by the acts of rebels over whom they could exercise no control, and which acts they had no power to prevent. Upon this ground, and without giving any opinion on the other points raised in the case, which will be considered hereafter in other cases, the claim of John Holmes Hanna is therefore disallowed.

Commissioner Frazer filed an opinion in this case (Hale's Report, 239; Moore, 2986), in which he held as follows :

The "State of Louisiana," which concurred and participated in the destruction of the claimant's property, was a rebel organization, existing and acting as much

in hostility to the government of the United States as was the Confederate States, so-called. It was in form and fact a creature unknown to the Constitution of the United States, and acting in hostility to it. It was an instrumentality of the Rebellion. Its agency, therefore, in the spoliation of this cotton cannot be likened to the act of a state of the American Union claiming to exist under the Constitution; and any argument tending to show that under international law the national government is liable to answer for wrongs committed by such a state upon the subjects of a foreign power, can have no application to the matter now under consideration. . . . The statement of the question would seem to render it unnecessary to discuss it. It is not the case of a government established *de facto*, displacing the government *de jure*. But it is the case merely of an unsuccessful effort in that direction, which, for the time being, interrupted the course of lawful government without the fault of the latter. Its acts were lawless and criminal, and could result in no liability on the part of the government of the United States.

To the same effect upon this point were the Laurie case (Hale's Report, 58; Howard's Report, 62; Moore, 2987) and the Stewart case (Moore, 2989; Hale's Report, 60).

500. In the Barrett case, for recovery upon a Confederate cotton loan bond (Hale's Report, 154; Moore, 2900; Howard's Report, 60), the following opinion had been given:

The Commission is of opinion that the United States is not liable for the payment of debts contracted by the rebel authorities. The Rebellion was a struggle against the United States for the establishment in a portion of the country belonging to the United States of a new state in the family of nations, and it failed. Persons contracting with the so-called Confederate States voluntarily assumed the risk of such failure, and accepted its obligations, subject to the paramount rights of the parent state by force to crush the rebel organization, and seize all its assets and property, whether hypothecated by it or not to its creditors. Such belligerent right of the United States to seize and hold was not subordinate to the rights of creditors of the rebel organization, created by contract with the latter; and when such seizure was actually accomplished, it put an end to any claim of the property which the creditor otherwise might have had. We are therefore of opinion that after such seizure the claimant had no interest in the property, and the claim is dismissed.

501. So in the case of Walker (Hale's Report, 153; Moore, 2901), where money had been invested in bonds of the Confederate States, such investment being made under the order of the court and the funds used for the purposes of carrying on the Civil War, the commission unanimously disallowed the claim.

502. The case of the Venezuelan Steam Transportation Company (Moore, 1727) has sometimes been cited as an authority in favor of the liability of the government for the acts of unsuccessful revolutionists, an award having been given for the claimant, but without opinion, by the majority of the commission, and the dissenting opinion,



presented by Andrade, Venezuelan commissioner, arguing in favor of the rule of law laid down in the preceding cases. In discussing this case, Ralston, umpire of the Italian-Venezuelan Commission, in the Sambiaggio case (Ven. Arb. of 1903, 666) referred to the many points upon which an award was claimed, adding :

Considering the multiplicity of contentions advanced on behalf of the United States and the absence of reasoning in the decision, it is impossible to say on what principle the case was decided, although it is fair to remark that it might be inferred from the dissenting opinion of Commissioner Andrade that the case affords support for the theory of the honorable commissioner of Italy.

Plumley, umpire of the British-Venezuelan Commission, speaking of the same case (Aroa Mines case, Ven. Arb. of 1903, 344, 382), said :

Much of the damage claimed as inflicted by the "Blues" was placed upon the *de facto* government, the "Yellows," by said agent on the ground of lack of diligence in permitting the "Blues" to remain so long in Ciudad Bolivar and in control of the vessels in question, when they could have been so easily dislodged, as was proven when the effort was in fact made. The case cannot be held as authority for or against the general rule of international law on this subject.

503. Before the various commissions sitting in Caracas in 1903, no question received more careful examination than that now under discussion. The first opinion, in point of time, in which it was elaborately considered and discussed by an umpire was that in the Sambiaggio case (Ven. Arb. of 1903, 666). Here the umpire, from the standpoint of principle, held that "unless it clearly appear that the government has failed to use promptly and with appropriate force its constituted authority, it cannot reasonably be said that it should be responsible for a condition of affairs created without its volition." He found himself "obliged to conclude, from the standpoint of general principle, that, save under the exceptional circumstances indicated [where it had failed or neglected to use its authority], the government should not be held responsible for the acts of revolutionists because : (1) Revolutionists are not the agents of government, and a natural responsibility does not exist. (2) Their acts are committed to destroy the government, and no one should be held responsible for the acts of an enemy attempting his life. (3) The revolutionists were beyond governmental control, and the government cannot be held responsible for injuries committed by those who have escaped its restraint."

In further discussion, he quoted the case of Prats, *supra*, and the language of Mr. Wadsworth :

Nonresponsibility on the part of the United States for injuries by the Confederate enemy within the territories of that government to aliens did not result from the recognition of the belligerency of the rebel enemy by the stranger's sovereign. It resulted from the fact of belligerency itself, and whether recognized or not by other governments. . . . The principle of nonresponsibility for acts of rebel enemies in time of civil war rests upon the ground that the latter have withdrawn themselves by force of arms from the control and jurisdiction of the sovereign, putting it out of his power, so long as they make their resistance effectual, to extend his protection within the hostile territory to either strangers or his own subjects, between whom, in this respect, no inequality of rights can justly be asserted.

After citing a large number of opinions of commissions, including among them many of those above referred to, the umpire expressly quoted Opinion No. 8 of the Spanish Treaty Claims Commission under the treaty of 1898, wherein it had been decided by a majority, the minority apparently not dissenting from the statement of principle, but regarding it as abstract or qualified by certain treaty stipulations or other matters not in point, that

(2) Although the late insurrection in Cuba assumed great magnitude and lasted for more than three years, yet belligerent rights were never granted to the insurgents by Spain or the United States so as to create a state of war in the international sense, which exempted the parent government from liability to foreigners for the acts of the insurgents. (3) But where an armed insurrection has gone beyond the control of the parent government the general rule is that such government is not responsible for damages done to foreigners by the insurgents. (4) This commission will take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States, and in war between Spain and the United States, passed from the first beyond the control of Spain, and so continued until such intervention and war took place. If, however, it be alleged and proved in any particular case before this commission that the Spanish authorities, by the exercise of due diligence, might have prevented the damages done, Spain will be held liable in that case.

As sustaining the position taken by him the umpire cited Hall, *International Law*, 231; Bluntschli, *Droit International Codifié*, Sec. 380 *bis*; Seijas, *Derecho Internacional*, Vol. III, 538; Despagnet, *Droit International Public*, 353; Calvo, *Droit International*, Sec. 86; Tchernoff, *Protection des Nationaux Résidant à l'Étranger*, 337; and the position taken by the British government with relation to claims for destruction of property in Panama in 1887 (United States Senate Document 254, 57th Congress, first session, 163), that government declining to hold the Colombian government responsible when it "was entirely powerless to prevent, although they eventually succeeded in quelling, the rebellion."

504. Another case containing a very thorough review of the law, with direct application to the situation existing under the special protocols, was that of the Aroa Mines (Ven. Arb. of 1903, 344), Plumley, umpire, concluding, after an elaborate discussion of all the preliminary correspondence between the countries, that Venezuela had assumed no special responsibility for the acts of unsuccessful revolutionists,—that she had only undertaken to be responsible for such injuries or damages as were "well founded in law and fact." He was influenced in his conclusion by the fact that many treaties between Venezuela and other countries had expressly recognized the nonresponsibility of Venezuela for acts not committed by her own authorities.

The same gentleman sitting as umpire in the Netherlands-Venezuelan Commission, in the Henriquez case (Ven. Arb. of 1903, 896) held that Venezuela was only responsible to aliens for injuries received from insurgents whom the government could control, and the fact that the government was negligent in a given case must be alleged and proved, the same rule being followed in the Salas case (Ven. Arb. of 1903, 903). The decision in the Aroa Mines case was followed in the Cobham case (Ven. Arb. of 1903, 409).

505. Umpire Ralston in the Sambiaggio case declined to recognize any equity in favor of those who claimed for damages under such circumstances as we are now considering (Ven. Arb. of 1903, 666), holding that "it is as inequitable to charge a government for wrongs it never committed as it would be to deny rights to a claimant for a technical reason"; and in this conclusion Plumley, umpire, in the Aroa Mines case concurred. The position taken by Ralston, umpire, in the Sambiaggio case was strongly attacked by Agnoli, Italian commissioner, in the Guastini case (Ven. Arb. of 1903, 730), but was adhered to. Shortly after, there were brought before this umpire the cases of Revesno and others (Ven. Arb. of 1903, 753), in which it was contended that, because revolutionists in large numbers were within thirty miles of Caracas for some considerable time, the government should be held responsible for not having promptly expelled them, and that thereafter, not having been expelled, they committed serious damages upon Italians, and therefore these cases were exceptions to the general rule laid down in the Sambiaggio case. The umpire said:

A study of these cases will show that the burden of proving want of diligence rests upon the claimants. In the *expedientes* now under consideration not a word of affirmative proof is furnished to show negligence on the part of the government.

The umpire is aware of the fact that for several months the revolutionists remained within a short distance of Caracas without being dislodged by the government, or perhaps without a serious attempt being made to dislodge them. But he is also aware that during that time war was being actively prosecuted over large areas of the country, while the external relations of Venezuela were in a state of danger. He is unable, and if furnished with data would doubt his right, to judge as to the military or political considerations which made military activity or concentration more necessary in one portion of the country than another. Furthermore, he knows nothing of the relative strength of the forces of General Rolando and of the government in this neighborhood or their advantages of location. He only knows that when the tension was apparently released elsewhere the forces of Rolando were attacked and ultimately defeated. The claimants, so far as the evidence shows, never made any appeal to the government for protection, as it was their right to do if they desired to obtain it, and although such appeal, if made, might have had an important effect upon the question of liability.

506. The principles of the Sambiaggio case were also followed in the Guerrieri case (Ven. Arb. of 1903, 753) and in the De Caro case (Ven. Arb. of 1903, 810), which refused to hold Venezuela responsible for forced loans exacted by unsuccessful revolutionists.

507. Duffield, umpire of the German-Venezuelan Commission, was called upon to examine this question in the case of Kummerow and others (Ven. Arb. of 1903, 526), and he considered at length the interpretation of the protocol under which he acted, with relation to the subject. The letter from Count von Quadt, Imperial German chargé d'affaires at Washington, to Mr. Bowen (Ven. Arb. of 1903, 1037), dated January 24, 1903, included a memorandum, signed at the same time by Minister Bowen, representing Venezuela, this memorandum reading in part as follows:

II. All the other claims which have already been brought to the knowledge of the Venezuelan government in the ultimatum delivered by the Imperial Minister resident at Caracas — i.e., claims resulting from the present civil war, further claims resulting from the construction of the slaughterhouse at Caracas, as well as the claims of the German Great Venezuelan Railroad for the nonpayment of the guaranteed interest—are to be submitted to a mixed commission, should an immediate settlement not be possible.

III. The said commission will have to decide both about the fact whether said claims are materially founded and about the manner in which they will have to be settled or which guaranty will have to be offered for their settlement. Inasmuch as these claims result from damages inflicted on property or the illegal seizure of such property, the Venezuelan government has to acknowledge its liability in principle, so that such liability in itself will not be an object of arbitration, and the decision of the commission will only extend to the question whether the inflicting of damages or the seizure of such property was illegal. The commission will also have to fix the amount of indemnity.

From the foregoing it appeared to General Duffield that Germany and Great Britain had insisted upon the admission of the justice in principle of the claims that their subjects had already presented, and, having done so, limited the powers of the commission. (It may be noted in passing, as a matter of fact, that none of the claims to which the attention of Venezuela had been called by Germany, being the claims above referred to, was for injury or loss committed by unsuccessful revolutionists, and it will be remembered that Plumley, umpire of the British Commission, after a most exhaustive examination in the Aroa Mines case of all the correspondence antecedent to the signing of the protocol, reached the opposite conclusion as to the proper interpretation of a like protocol.) The conclusion of General Duffield was that Venezuela had admitted in principle her liability for all claims resulting from the "present civil war" (that of Matos), no matter what might be their origin, although he stated that "the modern doctrine, almost universally recognized, is that a nation is not liable for acts of revolutionists when the revolution has gone beyond the control of the titular government. It is not necessary that either a state of war, in an international sense, should exist or any recognition of belligerency. Immunity follows inability."

The rule of liability under the protocol for the acts of Matos's revolutionists was also insisted on by the same umpire in the Valentiner case (Ven. Arb. of 1903, 562) and in the Mohle case (Ven. Arb. of 1903, 574), and the rule of nonliability for other unsuccessful revolutionary efforts was emphasized by him in the Van Dissel & Co. case (Ven. Arb. of 1903, 565), he again holding that under the general principles of international law no liability existed.

**508.** We will now refer to decisions in the various commissions sitting in Caracas, wherein the umpires were other than Americans.

In the opinion of Paúl, commissioner, in the Acquatella et al. case (Ven. Arb. of 1903, 487), it was maintained that no liability existed for damages committed by unsuccessful revolutionists, or upon receipts given by them. It seems, however, that the umpire of that commission, Mr. Filtz, of Holland, had no hesitancy in making an award in favor of the claimants under such circumstances, although he does not appear to have filed any opinion in support of his conclusions.

**509.** Gutierrez-Otero, umpire of the Spanish-Venezuelan Commission, was first called on to consider the question under discussion in the Padrón case (Ven. Arb. of 1903, 923). After a lengthy discussion he said :

It may be admitted as an established truth, that after a much-debated discussion concerning the responsibility of states for damages which revolutionists cause to the persons and properties of foreigners residing in their territory, a negative solution has predominated and been accepted among the rules and principles, to which the umpire has heretofore alluded, — that no right to demand indemnity for such damages exists; a principle, on the other hand, to which there have been pointed out various — we may say, numerous — exceptions which it is not necessary to state for the purposes of this decision.

After so pronouncing himself, the umpire held that, the commissioners acting as a tribunal required to "decide all claims upon a basis of absolute equity," the case before him should be returned to them for further consideration, with instructions to decide it irrespective of the rule as to liability ordinarily prevailing. The same umpire again followed the theory that Venezuela could not invoke the principle of irresponsibility for the acts of unsuccessful revolutionists in the Mena case (Ven. Arb. of 1903, 931).

510. In the case of Edgerton, before the British-Chilean Commission (Reclamaciones Presentadas al Tribunal Anglo-Chileno, Vol. I, 126), it was held that "when a government is temporarily incapacitated to control the acts of private individuals or of the people which have withdrawn themselves from its authority through an insurrection, a civil war, or local disturbances, it is not responsible for damages suffered by strangers."

511. Another case in which the doctrine we are now discussing has been under consideration was that of Rosa Gelbtrunk (Foreign Relations of 1902, 876), between the United States and Salvador, wherein all the arbitrators united in holding Salvador to nonliability for the acts of unsuccessful revolutionists.

512. We have not noted particularly the *Montijo* case (Moore, 1421), wherein it was sought to hold Colombia responsible for the acts of revolutionists against a state government. In this case Panama had granted an amnesty, and stipulated as one of the conditions of the treaty of peace with the revolutionists that it would pay for the use of the *Montijo*, but it failed to do so. The umpire considered the Colombian government the natural heir (if the expression might be permitted) of the liabilities of the state of Panama towards the owners of the *Montijo*, and under the circumstances above named held the government responsible. He added (page 1444), however:

There is another and a stronger reason for such liability. This is (B) that the general government of the Union, through its officers in Panama, failed in its duty to extend to citizens of the United States the protection which, both by the law of nations and by special treaty stipulation, it was bound to afford. It was, in

the opinion of the undersigned, the clear duty of the President of Panama, acting as the constitutional agent of the government of the Union, to recover the *Montijo* from the revolutionists and return her to her owner. It is true that he had not the means of doing so, there being at hand no naval or military forces of Colombia sufficient for such purpose; but this absence of power does not remove the obligation. The very first duty of every government is to make itself respected both at home and abroad. If it promises protection to those whom it consents to admit into its territory, it must find the means of making it effective. If it does not do so, even if by no fault of its own, it must make the only amends in its power, viz., compensate the sufferer.

513. We cannot better close this branch of our discussion than by referring to the letter of Baron Blanc (*Revue Générale de Droit International Public*, 1897, Vol. IV, 406, cited in note to Ven. Arb. of 1903, 666), he saying:

The case of damages proceeding from acts which, in violation of the laws of nations, have been committed by the authorities or agents depending upon the government against which one claims, is very different from the case of damages having other origins, as would be those occasioned by ordinary operations of war, or from acts proceeding from revolutionists or malefactors against the common law. As to the first, there is no doubt that the state should be held responsible; but as to the second, governmental responsibility lacks all rational basis, unless the government or its agents have, in an evident manner, failed to fulfill their own duty as to whatever was necessary to prevent the possibility of the damage of which complaint is made.

For further general discussion of this subject see article by Calvo in *Revue de Droit International* (Vol. I, 1869, 417), and by Professor L. de Bar in the same magazine (Vol. I, 1899, second series, 464); also *Annuaire de l'Institut de Droit International* (Vol. XVII, 1868, 96-137), and Wiesse's *Le Droit International Appliqué aux Guerres Civiles*.

#### EFFECT OF AMNESTY UPON LIABILITY OF GOVERNMENTS FOR ACTS OF UNSUCCESSFUL REVOLUTIONISTS

514. A difference of opinion has arisen among commissions as to the effect of amnesty upon liability under the circumstances we are just discussing. In the *Montijo* case (Moore, 1438) the umpire held that "even in the absence of any express stipulation to that effect, the grantor of an amnesty assumes as his own the liabilities previously incurred by the objects of his pardon toward persons or things over which the grantor has no control."

In the Cotesworth & Powell case (Moore, 2085) the umpire said:

The amnesty laws of the state took away from the claimants all appellate recourse, and all means of redress before the authorities at Bolivar. By subsequently

adopting those laws, the national government of Colombia rendered recourse to its tribunals equally useless. The chief executive of the nation was duly informed of these facts; but, after considerable delay, finally refused to provide means for reparation.

515. In the Bovallins and Hedlund case (Ven. Arb. of 1903, 952) Gaytán de Ayala, umpire of the Swedish-Venezuelan Commission, said :

Considering that at the time when the acts complained of were committed, and since then, the delinquents have not been chastised or prosecuted, but, on the contrary, their principal leaders have occupied for some time official positions, having been appointed by the present government of Venezuela, and that they are cloaked with authority in the very region where the events took place; . . . considering that the government of Venezuela, by conferring various public offices in the government of the country upon the principals of the said revolutionary forces, tacitly approves their conduct, and according to the principles recognized by public law makes itself responsible for all the acts done by them, etc.

He found against Venezuela.

516. The matter was discussed somewhat by Duffield, umpire, in the Wenzel case (Ven. Arb. of 1903, 590). He evidently inclined to the opinion that the granting of a pardon for political offenses by the government was tantamount to an assumption of personal liabilities for wrongdoing resting upon the persons pardoned, but acquitted Venezuela, as he considered that the granting of the pardon was in excess of the powers of the President. He referred, however, to a distinction possibly recognized by the Venezuelan Commission of 1889, as shown by the opinion of Commissioner Little, between failure to punish some offenders whose acts did not amount to a state of war, and failure to punish insurgents (de Brissot case, Moore, 2967).

517. On the other side is the opinion of Thornton, umpire of the Mexican-American Commission of 1868, in the Devine case (Moore, 2981), he saying :

It is urged that the Mexican government granted an amnesty to Carvajal and, therefore, made itself responsible for his acts. Other governments, including that of the United States, have pardoned rebels, but they have not on this account engaged to reimburse to private individuals the losses caused by these rebels.

518. It is to be noted as significant that, before the various commissions sitting to determine the liability of the United States growing out of the acts in connection with the Civil War, it seems never to have been urged that this country had assumed responsibility for the acts of the Confederacy because of having pardoned its leaders.

No case seems to have discussed a possible difference which might arise between the effects of an amnesty granted for the political offense



of rebellion and one covering as well private offenses against individuals, engaged in when the person charged was pursuing a rebellious course.

#### RESPONSIBILITY FOR THE ACTS OF MOBS

**519.** A kindred subject to that which we have just been discussing is the extent to which a government may be held responsible for the acts of rioters or of a mob, and the rule generally adopted has been fairly identical. We refer to incidental mention of this subject in cases just examined and proceed to discuss other cases.

**520.** In the Jeannotat case, Thornton, umpire (Moore, 3674), said :

It has been alleged that in the above-mentioned instance the sacking was done by the released prisoners, and by a mob belonging to the population of the town ; but, if it were so, it was the military force commanded by officers who put it in the power of the convicts and incited the mob to assist them in their acts of violence and plunder. It does not appear that without the arrival of the military force, which ought to have protected the peaceable inhabitants of the town, there would have been any inclination to commit such acts of violence. The umpire is therefore of opinion that compensation is due to the claimant from the Mexican government.

**521.** In the Donoughho case (Moore, 3014), Thornton, umpire, held Mexico responsible for the acts of a mob attributable to the improper conduct of the authorities.

Of like character were the occurrences in the Panama Riot cases (Moore, 1361), wherein it appeared that the police themselves had taken an active part with the rioters instead of endeavoring to control them, and New Granada was held responsible for violations of its convention to "preserve peace and good order along the transit route," and the awards were given.

On the other hand, in the Derbec case (Boutwell's Report, 114 ; Moore, 3029) the claim was rejected "upon the ground that the acts were committed by a mob in a riot, and not by the authorities of the United States."

**522.** In the J. L. Underhill case (Ven. Arb. of 1903, 49 ; Morris's Report, 164), Barge, umpire, held that the government "cannot be held responsible, as neither according to international, national, civil, nor whatever law else any one can be liable for damages where there is no fault by unlawful acts, omissions or negligence ; whilst in regard to the events of the morning of August 11, 1892, there is no proof of unlawful acts, omission, or negligence on the part of what then might be regarded as local authority, which was neither the cause of the outrageous acts of the infuriated mob nor in these extraordinary circumstances could have prevented or suppressed them."

**523.** As bearing upon this question, in the *de Brissot* case (*United States and Venezuelan Claims Commission of 1889*, 457; *Moore*, 2964) the words of Bluntschli (*Droit International Codifié*, Sec. 380 *bis*) were reported with approval: "States are not bound to allow indemnities for losses and damages suffered by aliens or natives resulting from internal troubles or civil war."

**524.** The matter is referred to in the opinion of Sir Henry Strong, umpire, in the *Gelbtrunk* case, he saying (*Foreign Relations of 1902*, 879) that it was "not to be assumed that this rule [of nonliability] would apply in a case of mob violence which might, if due diligence had been used, have been prevented by civil authorities alone or by such authorities aided by an available military force. In such a case of spoliation by a mob, especially where the disorder has arisen in hostility to foreigners, a different rule may prevail. It would, however, be irrelevant to the present case now to discuss such a question."

**525.** As to the rule advocated by the Institute of International Law, see *supra*, Sec. 495. That in the *Pacifico* affair (*Moore*, 2899), in which England demanded damages from Greece for mob violence, which were on arbitration in effect refused, no such damages could have been allowed, see notes on pages 595, 596, and 597, *Recueil des Arbitrages Internationaux*.

**526.** In the *Lagueruene* case before the commissioners under the act of 1849 (*Moore*, 3028) it was held:

The violence which the claimant says occasioned his loss was done, not by the authority or assent of the Mexican government, but by a lawless mob, and were all other objections to the claimant's right removed it is difficult to conceive how the Mexican government can be held liable for the consequences of the violence committed. Mobs and rioters are enemies of the public peace, and it is the duty of all peaceable citizens to assist in putting them down. "It is the duty of a government to pass laws to punish individuals who commit acts of violence, but the government is not responsible for those acts. For personal injuries and injuries done to the property of an individual by a mob the laws are open for redress, and to such means of redress persons must look, and not to the government. It is not pretended that the government of Mexico refused redress through her laws.

#### RIGHTS AND LIABILITIES OF GOVERNMENTS AS TO DUTIES AND TAXES

**527.** An unusual case was presented to the British-Venezuelan Claims Commission by the Asphalt Company (*Ven. Arb. of 1903*, 331). There the company designed to export goods to Venezuela from the island of Trinidad for the benefit of their undertaking in Venezuela, the goods to go necessarily to a port occupied by

revolutionists. The Venezuelan consul at the island of Trinidad undertook to refuse them proper clearance unless there was paid to him in Trinidad the duties which might have been collectable by the Venezuelan government at the port of destination had it been under its control. An attempt had been made to close the port in question by proclamation. The umpire said :

To assume to collect in Trinidad import duties on goods to be entered at Venezuelan ports was an act of Venezuelan sovereignty on British soil. It was wholly without right and directly against the right of sovereignty which inhered in the British government only. It could not be countenanced or permitted by and was a just cause of offense to that government. To take the other step and make the payment of these duties on British soil a condition precedent to the clearance by the Venezuelan consul of a British ship bound for a Venezuelan port was a most serious error on the part of such consul.

An award, therefore, was given for these acts, and no excuse was found in the fact that the duties were not again paid and that the claimant company had suffered no loss ; it being " the opinion of the umpire that an unjustifiable act is not made just because, perchance, there were not evil results which might well have followed. The claimant government has a right to insist that its sovereignty over its own soil shall be respected and that its subject shall be restored to his original right before consequent results shall be discussed."

The same rule was adopted by Duffield, umpire, in the *Orinoco Asphalt Co. case* (Ven. Arb. of 1903, 586), wherein clearance papers had been refused for twenty-two weeks because the boats in question were designed to go from Port of Spain, Trinidad, to the island of Pedernales, at that time under the control of revolutionists.

**528.** Import duties and other taxes wrongfully paid have repeatedly been the subject of allowance before commissions ; for instance, under the Mexican Commission of 1839, where there had been a wrongful collection of duties upon wrecked property (*Turner case*, Moore, 3126), an allowance was made for their return.

In the *Callahan case* before the same commission (Moore, 4346), an American vessel having been forced by stress of weather into the port of Vera Cruz, although bound for New Orleans from Gibraltar, and being refused clearance and the cargo having been taken off, the captain, unable to secure its restoration, obliged to pay the duties and sell the cargo at a sacrifice, and the vessel being detained even thereafter, an award was made to cover his loss.

Again before the same commission in the *Hammond case* (Moore, 3241), the claimant having been wrongfully charged with an attempt

to smuggle, and his goods seized and, without judicial proceeding or trial, sold, and the proceeds converted by the Mexican authorities, a recovery was had against Mexico.

**529.** In the case of Godfrey, Pattison & Co. before the United States and Great Britain Claims Commission of 1853 (Report, 304) it was said :

We are of opinion that as long as goods were received from the East Indies at the reduced rate of duty prescribed in the prior statute, they were entitled to be received from Great Britain charged at the same rate of duty. This is the only interpretation which it seems to us conforms to the just intent of the treaty. A construction, at least as favorable as that adopted by us, was given to this clause of the treaty by the British government on a claim in behalf of American citizens for repayment of the duty charged on rough rice. That claim was for a long time under consideration, and was settled by directing the excess of duties exacted to be repaid, as long as African rough rice had been allowed by law to be imported into England at a lower duty than was charged on American rice.

Interest was allowed on wrongful payments from the time of making. So in the Wirgman case before the same commission (page 312) a like allowance was made.

**530.** In the Speyers case, Lieber, umpire of the Mexican-American Commission of 1868 (Moore, 2870), held that a tariff enforced by authorities under the Mexican government was to be treated as valid, although it was different from that laid down by the Mexican Congress and was afterwards abrogated by decree of the federal government. The authorities exercising such tariff had been, in the umpire's opinion, maintained for a long time and apparently countenanced by the general government. Afterward, in the Bronner case, involving a question as to the validity of the same tariff, Sir Edward Thornton (Moore, 2871) considered it very questionable whether any one had a right to claim compensation for an injury which he conceived was somewhat doubtful, the government having the right, however impolitic it might be to exercise it, to discriminate with regard to duties in favor of any particular one of the ports and against others.

**531.** In the Lewis case (Hale's Report, 162), recovery was allowed against the United States by the majority of the commission, although it was contended on behalf of the United States that, had application been made in suitable time to the Secretary of the Treasury, the wrongful decision of the subordinate officers, under which duties had been collected, would undoubtedly have been corrected.

**532.** In the De Caro case (Ven. Arb. of 1903, 810) an allowance was made in favor of the claimant for taxes collected by state authorities on exports in violation of the constitution.

So when a vessel was detained to enforce the wrongful payment of duties, demurrage was allowed (Adams case, Wadsworth for the commission, Moore, 3065).

**533.** On the other hand, where coal was imported for use on the eastern voyage, drawback was not a matter of right, it being said by Upham, commissioner, in the case of the Great Western Steamship Company (United States and Great Britain Claims Commission, Report, 328; Moore, 3365):

A drawback on goods exported is granted on the ground that they are in transit for a market, but where they have once found a market so as to be appropriated to use, and are not further placed *in transitu, as an article of commerce*, the ordinary duty claimed on the article rightfully attaches, whether it be consumed at sea or on land.

Nevertheless, taking a liberal view of the act of Congress of March 3, 1853, Mr. Upham allowed the drawback, and upon another construction the British commissioner did the same, interest being granted from July 1, 1850, from which date the Secretary of the Treasury was authorized to cancel any outstanding debenture bonds given prior thereto on the importation of foreign coal, provided the said coals had been exported to a foreign port or consumed upon the outward voyage and not consumed within the United States.

**534.** Taxes voluntarily paid, however, were not recoverable, it appearing in the Brewer, Möller & Co. case (Ven. Arb. of 1903, 584) that the tax was "a general one and that the classification" was "made upon a basis of the values of property. . . . Moreover, the claimants do not appear to have raised any objection to the classification, but paid the taxes voluntarily. It is a settled law that the voluntary payment of taxes purporting to be levied under a valid law waives all irregularities in the assessment."

So, as was said in the Hickman case, Wadsworth, commissioner (Moore, 3423): "All the items of the claimant's demand are extraordinary but general taxes. They are not individual levies, but were shared by the whole state in a fixed proportion. They do not constitute 'wrongs' within the sense of our convention, and the claim is accordingly dismissed."

**535.** An unusual position was taken by Bates, umpire, in the case of McCalmont, Greaves & Co. (United States and Great Britain Claims Commission, Report, 339; Moore, 2866), wherein, the claimants having stored goods in Mexico during the war between the United States and Mexico, which goods were subject to the provisions of a temporary tariff, against which the claimants protested, receiving

permission to allow their goods to remain on deposit until an answer to their representations came from Washington and the representations were favorably acted upon, the collector thereafter refused to receive the duties under the modifications they had sought, but demanded the duties under the unmodified tariff. The umpire said :

It cannot be said that these duties were not levied according to law ; nevertheless, as the modifications in the tariff were made at the suggestion of the claimants, it seems a hard case that they should be the only parties not allowed the benefit of the alteration. . . . These duties, as before stated, were levied in conformity with law ; and it is only the peculiar circumstances and hardships in the case of the woolens that could justify this commission in granting any portion of the claim.

Their claim was accordingly allowed.

**536.** Under another heading we have referred to the fact that payment of taxes to a revolutionary government, being in the neighborhood a government *de facto*, discharges, in so far as such taxes are concerned, the obligation of the taxpayer, and the titular government reassuming control cannot enforce a second payment, such being the holding in the Guastini case (Ven. Arb. of 1903, 730) and in the Santa Clara case (Ven. Arb. of 1903, 397).

**537.** Where customs receipts have been pledged for the payment of a debt and the pledge disregarded, the government is held responsible. Thus in the Moses case, Wadsworth, American commissioner of the Mexican-American Commission of 1868 (Moore, 3465), held that such conduct constituted a tortious act which formed a basis for an award, without reference to the question whether the commissioners could allow claims founded in contract. Mr. Palacio, the Mexican commissioner, joined in the award, without stating his reasons for so doing.

In an unreported case before the Italian-Venezuelan Commission sitting in Caracas in 1903, it appeared that national obligations had been given against a pledge to pay the same by lot out of the surplus which might exist annually in certain governmental funds. It appeared that, although such surplus had existed during several years, no such selection by lot had taken place, but the surplus had been used for other purposes. The umpire held that the debt could be considered as having matured, because of this default on the part of the government, and gave award accordingly.

**538.** The payment of customs duties to a revolutionary government in control at the port is not an act of aid and comfort to the authorities in rebellion, and does not constitute unneutral conduct which would bar the claim, and it was so held in the case of de Forge (French-American Claims Commission, Boutwell's Report, 105 ; Moore, 2781).

539. In the *Caroline B. Slocum* case (Moore, 3140), the claimant contending that the tax was unjust, Thornton, umpire, held that it was his duty to protest against such payment and appeal to the proper authorities for a refund; and although he had been imprisoned for nonpayment, having had a right to proceed in a higher court against the officer imprisoning him, and to hold him to account, the Mexican government was acquitted of responsibility.

In the opinion of the arbitrator, Hon. William R. Day, in the Metzger case against Haiti (Foreign Relations of 1901, 264), it appears that it was contended that under general international law redress for wrongful payment of taxes (an amount being levied against Americans twice as great as that paid by Haitians) should first be sought in the local courts. The arbitrator, however, considered that, as the whole subject matter had been referred to him, there could be no valid ground of objection to the granting of relief by him, in the absence even of any appeal to the local courts.

#### FORCED LOANS

540. The question of the liability of governments for the repayment of forced loans has received considerable attention at the hands of commissions, resulting, however, in some differences of opinion, based perhaps upon a misunderstanding in certain cases as to exactly what is meant by the term. The term "forced loans" is properly applied to cases where civil or military authorities, without legal justification and without any pretense of proceeding under the due forms of law, have levied upon particular individuals assessments of given amounts, the understanding and the practice being that, if such assessments were not met within the short time usually allotted for their payment, the persons upon whom they are laid would be conducted to jail and detained until convinced of the necessity of meeting the exaction. This is the manner, certainly, in which they have been levied and enforced in Venezuela and other South or Central American countries. Nor has the government apparently felt any moral obligation usually to repay to the particular individuals the moneys so exacted from them, the only exception within the author's knowledge having occurred in Caracas in 1903. During the Matos revolution a large number of business houses of that city were notified that they should pay fixed amounts forthwith to the government, and, rather than accept the implied alternative, they made these payments. President Castro, in the summer of the year mentioned, issued an

order, much to the surprise of the unfortunate victims and apparently without precedent, that in these instances repayments should be made.

As to the utter illegality of loans of such character, it would seem that no doubt could exist ; and yet, as we shall find, at least one umpire has in certain cases treated forced loans as legal, and has insisted, in the particular cases to which reference will be made, that, before resorting to an international tribunal for relief, the persons injured should have sought such redress as might be obtainable from the local authorities. It is to be supposed that the umpire in question did not always differentiate between "forced loans," properly so called, and extraordinary taxes, as to which there might in certain cases be no relief whatsoever, or relief obtainable from the local authorities.

**541.** With this introduction and explanation, and commencing the study of the cases as they have come before international tribunals, we find the first reference to the subject to have been made by the Mexican Commission of 1839, in the Ducoing case (Moore, 3409). The amount of the forced loan levied was a thousand dollars, but the claimant complained that in its enforcement money and property of the value of two thousand dollars was taken from him by the Mexican authorities, and an allowance was made for the full amount so taken.

**542.** In the Miller case before the Mexican-American Commission of 1868 (Moore, 2974), the claimant demanding payment for a forced loan, which it was said was "raised" in the shape of a pillage, Dr. Lieber did not hesitate to grant an award, finding that the authority levying it represented the government.

**543.** In the Moke case (Moore, 3411), before the Mexican Commission of 1868, the claim was made for a thousand dollars exacted as a "forced loan," and five hundred dollars as damages for a day's imprisonment to which the claimant was subjected "to force the loan," and three hundred dollars as a subsequent forced loan. Wadsworth, commissioner, delivering the opinion of the commission, said :

The forced loans were illegal ; the imprisonment was only for one day, and resulted in no actual damage to claimant or his property ; but we wish to condemn the practice of forcing loans by the military, and think an award of five hundred dollars for twenty-four hours' imprisonment will be sufficient. While the calamitous circumstances surrounding the officers of the government and the people of Mexico at the time are entitled to much consideration on the question of damages, nevertheless we cannot too strongly condemn this arbitrary, illegal, and unequal way of supplying the wants of the military. If larger sums in damages, in such cases, were needed to vindicate the right of individuals to be exempt from such abuses, we would undoubtedly feel required to give them.



**544.** The same question was raised before Sir Edward Thornton, as umpire, with, as we shall see, varying results. Considering it in the *McManus* case (Moore, 3415), the umpire, after examination of the treaties between the two countries, could find no mention of forced loans and no stipulation according or implying the exemption of American citizens from their payments. He found no evidence that the claimants ever made any application to the Mexican government or were refused payment; the defensive evidence, he said, "asserts that those who applied were repaid, and the claimants do not rebut this assertion." He continued:

Article 9 of the same treaty [1831] stipulates that "the citizens of both countries, respectively, shall be exempt from compulsory service in the army or navy; nor shall they be subjected to any other charges, contributions, or taxes, than such as are paid by the citizens of the states in which they reside." Forced loans may well be included in "charges, contributions, or taxes," and the clear inference is that if the citizens of the state were subjected to forced loans, hard and impolitic as they might be, citizens of the United States were not exempt from them. For it appears by the evidence, and the claimants do not deny, that these forced loans were distributed amongst the whole of the inhabitants, whether native or foreign, of the republic or of the particular state.

The umpire drew a distinction between the treaties entered into by the United States and Mexico and those between Mexico and a large number of European nations, which expressly provide as to their subjects that "no forced loans shall be levied upon them," or in the Spanish version "no forced loans shall be levied specially upon them," and considered that impliedly "forced loans may be levied upon the citizens and subjects of the contracting parties, provided they be not levied especially upon them, without at the same time and in the same proportion being levied upon all the other inhabitants of the respective countries, whether natives or foreigners."

The umpire further observed that the claimants had made continuous payments on account of forced loans for several years without making any representation upon the subject to their government, or, if they did so, that the United States government addressed no remonstrance to the Mexican government against their exaction.

**545.** In the *Rose* case (Moore, 3421) Sir Edward Thornton expressed his understanding of a forced loan as meaning one "levied in accordance with law. It is equally distributed amongst all the inhabitants of the country, whether natives or foreigners. It is a tax which becomes smaller or greater according as it is repaid sooner or later, partially or not at all. If the foreigner is reimbursed at the same time as the native, or if neither of them are reimbursed at all,

the foreigner has no ground for remonstrance. As long as the foreigner is placed upon the same footing as the native he cannot complain. But if there be unfairness in the distributing of the loan or in its repayment, and if any preference be shown to the native, the foreigner has good ground for complaint. A forced loan equitably proportioned amongst all the inhabitants is a very different thing from the seizure of property from a particular individual." After commenting upon a certain lack of proof, the umpire continued :

But the mode employed by the authorities of enforcing the payment of the forced loan of five hundred and fifty dollars, the umpire does not think justifiable. If the forced loan was legally imposed, there must have been means of enforcing its payment by judicial proceedings, and the arrest and subsequent detention of the claimant, though it is not proved that the latter was of long duration, and the menaces to which he was subjected, were not justifiable and entitle him, in the opinion of the umpire, to some small compensation.

So in the *McManus* case (Moore, 3422 ; see also *supra*), for a few hours' detention for the nonpayment of a forced loan the umpire allowed five hundred dollars, as he had done in the *Rose* case, just referred to, and did as well for a few days' imprisonment for failure to meet a loan, in the case of *Hicks* (Moore, 3422).

546. In the case of the heirs of *Young* (Moore, 3423), Thornton, umpire, intimated that such claims should be presented to a Mexican tribunal organized under the law of 1867, and he took the same position in the case of *Pradel* (Moore, 3423), although *Lieber* had held in the *Manasse & Co.* case (Moore, 3423) that the existence of such a tribunal was no bar to the jurisdiction of the commission.

In the case of *Vega* (Moore, 3423), Thornton again held that the forced loan was a matter with regard to which the commission had no power to order compensation, although the right of the claimant to ask from the Mexican government reimbursement of forced loans was not prejudiced on that account.

In the *Palacio* case (Moore, 3423), as the receipts indicated that the sum receipted for was the claimant's share of the loan, which was also levied upon the other inhabitants of the jurisdiction, he said the claim should be dismissed.

In the *Weil* case (Moore, 3424), Sir Edward Thornton felt that the fine for the nonpayment of a forced loan, and imprisonment was illegal in the face of the claimant's plea that he was not liable for the loan, because not resident in the district, but merely passing through.

547. In the *Tagliaferro* case (Ven. Arb. of 1903, 764), recovery was allowed for a forced loan, it being said by *Ralston*, umpire,

referring to the same and the proceedings taken to enforce it, that "the forced loan violated many provisions of the Constitution, among them, that property should only be subjected to contributions decreed by the legislative authority, in conformity with the Constitution; that no Venezuelan could be taken or arrested for debts not proceeding from fraud or wrongdoing; that all shall be judged by the same laws and subject to like duties, service, and contributions. Strangers enjoy, under the Constitution, all the rights of Venezuelans."

The same umpire in the De Caro case (Ven. Arb. of 1903, 810, 818) held Venezuela responsible for loans required by one of its generals, but declined to hold the government responsible for similar loans exacted by unsuccessful revolutionists.

So also in the Giacomini case (Ven. Arb. of 1903, 765) the umpire of the Italian-Venezuelan Commission held Venezuela responsible for the forced loans exacted by one of its generals and for imprisonment to enforce its payment.

In the Beckman & Company case, Duffield, umpire of the German-Venezuelan Commission (Ven. Arb. of 1903, 598), held Venezuela responsible for a forced loan imposed by one of its states.

**548.** Before the commission appointed under the Mexican-American treaty of 1849 a claim was presented for the amount of a forced loan made in California in 1836, by order of the government, from the funds of the claimants, Thompson and Jones (Moore, 3410), and other claims of a like nature were presented by Sanforth Kidder (Moore, 3410). These claims were allowed. In the case of W. S. Parrott, before them for a forced loan exacted in 1836, the commissioners said (Moore, 3410): "This item was allowed by the Mexican members of the mixed commission [of 1839] to be valid. The board accordingly decide that this item of the claim is valid and it is allowed accordingly."

#### LIABILITY OF GOVERNMENTS FOR SEIZURES

**549.** Several of the protocols under which the commissions operated in Venezuela in 1903 provided substantially, as in the British-Venezuelan protocol (Ven. Arb. of 1903, 292), that "the Venezuelan government admit their liability in cases where the claim is for injury to, or wrongful seizure of, property, and consequently the questions which the mixed commission will have to decide in such cases will only be: (a) whether the injury took place and whether the seizure was wrongful, and (b) if so, what amount of compensation is due."

The exact meaning of the words "wrongful seizure" received elaborate consideration at the hands of Plumley, umpire (Crossman case, Ven. Arb. of 1903, 298), and he held :

Negatively it may be stated that it is not any wrongful taking of the property of a British subject by Venezuela. It does not mean property taken by robbery, theft, pillage, plunder, sacking, or trespass. Affirmatively it may be said that it is limited to a seizing under and by virtue of authority, civil or military. Necessarily it follows that it is always legitimate to inquire in any case raised under the protocol how, when, where, and by whom it was taken or used. Given that a seizure is made out, there is yet to be established that it is wrongful, and therefore the import of the words in their connection and relation as used in the protocol is a necessary matter to determine. There is required in every case a wrongdoer as well as that wrong has been done or suffered. A wrong intent or willful purpose must accompany the act. It is not enough to know that a wrong has been suffered. Not only must the act be willful or with wrong intent, but it must be perpetrated by some one having a right whereby to declare and express a governmental will and intent. . . . An act of pillage, plundering, or sacking is a direct antithesis of an act of seizure. The first implies not only a lack of authority, but an act done in immediate contravention of all authority. It disclaims and denies governmental responsibility, and is in direct opposition to that authority. To seize directly implies authority, warrant, and executive responsibility. In peace it ordinarily requires an officer duly commissioned, armed with a warrant duly issued. In war it likewise requires a condition of authority and power.

The Crossman decision was emphasized by the same umpire in strong language in the Aroa Mines case (Ven. Arb. of 1903, 344), with a multitude of citations sustaining his position, and again by Mr. Plumley when acting as umpire of the Netherlands Commission in the Henriquez case (Ven. Arb. of 1903, 896).

A like conclusion was reached by Ralston, umpire of the Italian-Venezuelan Commission, in the Sambiaggio case (Ven. Arb. of 1903, 666).

**550.** A seizure by a government under administrative processes pursuant to the order of the highest administrative authority of the jurisdiction does not constitute such process of law as will make it rightful, and this was held by the American arbitrator in the Rivas case before the Spanish Commission (Moore, 3781), the umpire, Count Lewenhaupt, concurring, maintaining that "a law which vests in the Governor General the powers to define offenses, affix penalties, and to proceed summarily or administratively does not seem to me to meet the requirements of the treaty. Even if a state of things existed which justified a summary procedure it could not justify the infliction of penalties not authorized by law. The suspension of courts is not a suspension of law."

## RESPONSIBILITY IN PARTICULAR INSTANCES

551. We discuss elsewhere responsibility of governments for acts arising out of a state of war, expulsion, wrongful imprisonment, breaking of contracts and other matters of importance. For the moment, and as being matters of less relative gravity, we refer to the fact that governments have been held responsible for wrongful confiscation, as in the Maxwell case (Hale's Report, 170; Moore, 3750), although not held for erroneous information and declaration of a marshal that a sale under confiscation would carry a fee, that being determined by public statutes to which the purchaser could appeal (Brugère case, Boutwell's Report, 103; Moore, 3753); for the wrongful interpretation of an order of the Secretary of the Treasury, injurious to the claimant, in the case of Sheldon Lewis (Hale's Report, 162), Commissioner Frazer dissenting; for the forcible detention of a vessel, although political necessity dictated such detention, as in the Bailey and Leetham case (Steamer *Labuan*), the owners being regarded as deprived of their property for public benefit (Hale's Report, 171; Moore, 3791); for wrongful seizure and detention of property, as in the Hodges case (Hale's Report, 168); for the loss of a vessel wrongfully taken but destroyed by accident, a result of mismanagement, as in the case of the *John* (Great Britain and American Arbitration of 1853, 427; Moore, 3793, 3797), in the latter case it being said that the governmental agent was "a wrongdoer from the outset; he has converted the property from the instant of possession, and the subsequent calamity which may happen, however inevitable it may be, is no excuse for its loss." So also is a government responsible for the breaking of its contracts, although possessing the power to do so, as was said, supra, in the Oliva case (Ven. Arb. of 1903, 771).

552. As we have seen, however, a government is not responsible for bonds issued by those in rebellion, and this nonresponsibility exists even though the government seizes assets belonging to the rebels (Barrett case, Hale's Report, 154; Moore, 2900), and is not responsible, by the weight of authority, for the acts of unsuccessful revolutionists; nor is it held liable for the effects of a law changing the legal tender, as was held in the case of Adam (Hale's Report, 159; Moore, 3066), who sought to recover for being compelled to receive depreciated currency for interest on bonds in the place of gold; nor may it be held responsible where claimant's property appears to have been mixed with the property of the enemy and taken possession of with it, as was the case of Campbell & Company (Hale's

Report, 163; Howard's Report, 64). So also, as we have seen at length, the government may escape responsibility for the acts of its minor officers not the direct representatives of national authority, or for the errors of national courts, in the absence of fraud, corruption, or willful injustice or injury, as was held in the case of Barron, Forbes & Co. (Hale's Report, 164; Moore, 2525; Howard's Report, 83), and in other cases already cited. So responsibility does not exist for the results of a raid except for failure of employment of due diligence (St. Albans cases, Hale's Report, 21; Moore, 4042).

The Portuguese government was held by the French Emperor (Moore, 1093) freed from responsibility for the attack of the English in 1814 upon the *General Armstrong* at the port of Fayal. The arbitrator found, among other things, that the captain of the American privateer had not applied to the Portuguese government for protection until blood had been shed, and that the weakness of the garrison and the condition of the guns rendered interference impossible. He further held that the resort of the captain to arms to repel the aggression against him was a failure to respect the neutrality of the port, and released the Portuguese sovereign from any obligation to offer him protection other than by pacific intervention.

**553.** A case of responsibility *sui generis* was that of the Hudson's Bay Company against the United States, before the United States and Great Britain Claims Commission of 1853 (Report, 164; Moore, 3458). In the autumn of 1847 a number of American emigrants and settlers in Oregon were attacked by the Cayuse Indians, thirteen being murdered, including Dr. Whitman, an American missionary, and sixty-four captured. The captives were ransomed through the agency of the Hudson's Bay Company. The country was not at that time under a government regularly established by the United States, but the settlers had formed themselves into an organization and government of their own, and applied for assistance to the Hudson's Bay Company. The agents of the company rendered assistance in provisions and stores to the amount of \$1800, part of which had been repaid by the Oregon government. A further claim was made for goods supplied on the application of American officers for the purpose of procuring the release of American shipwrecked mariners, who were retained in captivity by the Indians. Hornby, the British commissioner, delivering the opinion of the commission, premised that the settlers of the Oregon territory were entitled to the protection

and aid of the United States government, that they had established temporarily a government of their own and were attacked by the Indians under circumstances of barbarity. He continued :

The circumstances required immediate effort and assistance, and this assistance, as far as it was in their power, was promptly rendered by the agents of the Hudson's Bay Company. The form of the claim as it originally existed was not directly against the United States, but no objection is interposed from that cause. The assistance is precisely of the character the government would have rendered could application have been made to it ; and, on every consideration, we are quite sure we shall have its approbation in the allowance of the claim which appears to be preferred here for the first time. The other item of claim depends on circumstances somewhat similar. Assistance rendered to shipwrecked mariners is in conformity to the established policy of both governments through their consuls and other officers abroad, and in this case the captivity of these men by savages was superadded. The assistance rendered through the agents of this company, made by request of Americans on the coast, secured the release of these unfortunate men, and I am happy in having the concurrence of my colleague in granting full remuneration for the expenditures incurred in effecting so laudable an object.

#### RIGHT OF GOVERNMENT TO RECOGNIZE NATIONALITY OF ITS OWN VESSELS

554. In the *Montijo* case (Moore, 1433, 1434) the umpire said : "The undersigned cannot go behind the undoubted fact that the government of the United States considers the *Montijo* as an American ship. On this point it is the sole judge." That the conclusion of the umpire as to the fact of nationality was correct there can be little doubt, the Colombian contention having been that "the *Montijo* was not entitled to be reputed as an American vessel because only a third of her crew were American citizens, and that this is a violation of the law of the United States." To this the umpire remarked that it was "rather a question for the government of the United States than for this tribunal of arbitration." The remark was undoubtedly justified, the United States alone having a right to punish such an infraction of its laws, without its affecting any question of nationality. But the broad language used by him and above cited can hardly be sustained when one bears in mind the many cases in which, with propriety, claims recognized as belonging to the claimant country have been found by commissions not to possess the character in which suit was brought,—a condition in many respects analogous to that presented to the attention of the umpire in the *Montijo* case.

## EFFECT OF COMPROMISE MADE WITH A GOVERNMENT

555. That a compromise duly entered into between a government and an individual will be recognized and will not be reopened, although the claimant allege, as having created duress, a fear that unless he accepted other suits might be instituted, was held by Upham, American commissioner, speaking for the commission in the Kenworthy case, British-American Claims Commission of 1853 (Report, 336).

556. In the De Caro case (Ven. Arb. of 1903, 810) the Italian-Venezuelan umpire respected a compromise between the claimant and the Venezuelan government, although indicating his judgment that, had the compromise not been entered into, an award would have been made in favor of the claimant. He declined to agree to its acceptance in part, with an attempted reservation to claim for damages for the conduct of the government with relation to the steps taken by it prejudicial to the claimant, saying :

He feels compelled to regard the compromise as a complete and final settlement of any issue growing out of the acts to which the compromise related, whether such issue had reference to the original dispute or the proceedings taken to enforce the original claim. He cannot recognize that De Caro accepted the benefit of the compromise of the original claim and at the same time reserved a right of action for steps taken to enforce it.

557. Somewhat similar in principle was the position taken by the arbitrator in the Manica dispute between England and Portugal, he holding, with reference to the compromise agreement (Moore, 5007), that "one must say that it must be taken in its entirety or dropped altogether. Portugal, which accepts the greater part which is to its advantage, cannot reject the other to the disadvantage of Great Britain without evidently disturbing the balance of justice and deranging the equilibrium between the parties."

558. The government, however, as well undoubtedly as the individual entering into a compromise, will make itself liable if it be not carried out, and such was the holding of Bates, umpire (British-American Claims Commission of 1853, Report, 453 ; Moore, 3401), in the case of Uhde & Company, who were awarded damages because of the failure of the United States to carry out a compromise.

559. Sir Edward Thornton, sitting as umpire in the case of the *Canada* between the United States and Brazil, declined to be influenced by the fact that at one time the United States had offered to accept a reduced sum as a compromise (Moore, 1745), saying :

Such offers are made for various reasons. It may be that the claimant is much in want of the money to which he is entitled, and desires to obtain compensation



at once. His government is perhaps wearied of litigation, and desires not to embitter the relations between two friendly countries by useless discussion. An offer is therefore made, even involving a sacrifice.

#### CONTINUITY OF GOVERNMENTS

**560.** The theory of the continuity of governments (considered by the Franco-Chilean Commission, *supra*, Sec. 430) received discussion in the Day case before the United States and Venezuelan Claims Commission of 1889 (Report, 247), wherein it was said, citing Halleck (International Law, 29):

The state is a person in law, and when once admitted into the family of states preserves its identity as an international person, until it is lost by absorption in some other state, or by the continuance of anarchy so prolonged as to render reconstitution impossible, or in a very high degree improbable.

Continuing the subject, the commission added:

As a person invested with a will which is exerted through the government as the organ or instrument of society, it follows as a necessary consequence that mere internal changes which result in the displacement of any particular organ for the expression of this will, and the substitution of another, cannot alter the relations of the society to the other members of the family of states as long as the state itself retains its personality. The state remains, although the governments may change, and international relations, if they are to have any permanency or stability, can only be established between states, and would rest upon a shifting foundation of sand, if accidental forms of government were substituted as their basis.

To this general effect the commission cited Grotius (Book II, Chap. IX, Sec. 8), Tindall, Law of Nations, and Phillimore (Vol. I, 174, quoting approvingly Kent, Vol. I, 25, 26), and continued: "It is a clear position of the law of nations that treaties are not affected nor positive obligations of any kind with other powers or with creditors weakened by internal changes in the form of government. The body politic is the same although it may have a different organ of communication." Again, quoting Halleck (page 77): "A state is responsible for the wrongs done to the government or subjects of another state notwithstanding any intermediate change in the form of government or in the persons of its rulers. Treaties of amity, commerce, and real alliance remain in force; *public* debts, either to or from the state, are neither canceled nor affected."

**561.** In the case of Atlantic and Hope Insurance Companies against Ecuador (Moore, 3223), Hassaurek, for the commission, citing Kent (Commentaries, Vol. I, 25), Bello (Derecho Internacional, 20), Phillimore (International Law, Vol. I, Art. II, Chap. VII, Secs. 137, 158), and Grotius (Book II, Chap. IX, Sec. 8), said:

That a state never loses any of its rights, nor is discharged from any of its obligations, by a change in the form of its civil government, is one of the fundamental principles of international law. It applies, by analogy, to cases such as the one before us, where one part of a nation separates itself from the other. It is evident that on the creation of a new state, by a division of territory, that new state has a sovereign right to enter into new treaties and engagements with other nations; but until it actually does, the treaties by which it was bound as a part of the whole state will remain binding on the new state and its subjects.

**562.** A variation of this question arose before the United States and Great Britain Claims Commission of 1853 (Report, 382), the case being decided by the umpire and subject thus treated in the headnotes:

In 1839, bonds were issued by the Republic of Texas for advances of money made to the government by the claimants. These bonds were secured by a pledge of the faith and revenues of Texas. In 1845, Texas was received under the general government of the United States, retaining all her public lands, and with a provision between the two governments that these lands were to be applied to *the payment of the debts of Texas*, and that *such debts were*, in no event, to be a charge *on the United States*. In 1850, the United States purchased large tracts of land of Texas, and provided that five million dollars of the purchase money should be reserved by the United States to be applied in payment of debts for which duties on imports had been specially pledged. This and other acts have been pending between the two governments to the present time relative to the adjustment of these debts. During this period the British government has never received or recognized the claims of any owner of these bonds, as a subject for international interposition against the United States. *Held*, under these circumstances, that such claims were not included in the unsettled claims referred to the commissioners by the convention of February 8, 1853, and that the commissioners had no jurisdiction over them. A pledge of the revenues of the government is in the nature of a lien to the creditor, and is binding on its transfer to another nation; but *quare*, whether such lien can justly extend to an amount clearly beyond the value of any such revenues, so as to operate as a bar to international union. Also, where a nation is not fully merged in union with another, but retains independent powers and jurisdictions, whether an equitable apportionment of its liabilities may not be made between the two governments as a preliminary to such union, without a just ground of complaint on the part of creditors.

## CHAPTER XII

### PRESCRIPTION

#### EXTINCTIVE PRESCRIPTION

**563.** Of the two kinds of prescription, acquisitive (acquisition by usucaption) or extinctive, the latter has more frequently received the consideration of claims commissions, and to it in particular we desire first to address ourselves.

In the Pious Fund case, before a tribunal of the Hague Permanent Court of Arbitration, it was held that the rules of prescription related exclusively to the domain of civil law and could not be applied to the international conflict between the United States and Mexico (United States Agent's Report, Pious Fund case, 17 and 876). Nevertheless, in the Gentini case (Ven. Arb. of 1903, 720) the umpire pointed out the distinction between *rules* of prescription, which were such as would be established by a government, and the *principle* of prescription, which he said was "well recognized in international law," and could be applied as well to a conflict in which a state was a party as to a conflict between private individuals.

**564.** One of the earlier cases in which the matter was discussed was that of Black & Stratton, before the Mexican-American Claims Commission of 1868 (Moore, 3139), Thornton, umpire, not feeling justified in condemning the Mexican government upon weak evidence as to the illegality of the acts of its authorities and after more than fifteen years had elapsed without the claimants having made any complaint whatever of the conduct of those authorities.

In the Mossman case (Moore, 4181) the same umpire said :

It seems unfair that the latter [the Mexican government] should be first informed of the alleged misconduct of its inferior authorities more than fifteen years after the date of the acts complained of. The umpire cannot under this circumstance consider that the Mexican government can be called upon to give compensation for a very doubtful injury, and he therefore awards that the claim be disallowed.

The preceding umpire of this commission, Colonel Lieber, evidently felt the influence of the ideas above expressed, for in the Selkirk case (Moore, 3130) he refers disapprovingly to the fact that the

claimant had allowed nearly twenty full years to elapse before the presentation to Mexico of his claim.

565. The same question as to the right to invoke prescription in favor of a nation before a mixed claims commission arose before the United States and Venezuelan Claims Commission of 1889 (Report, 51; Moore, 4181), in the Williams case, wherein the commission argued at great length and with marked ability in favor of the application of the principle of prescription. Among other things, they said :

It thus appears then that the claim was not brought to the attention of the Venezuelan government until twenty-six years after its inception. Its ownership, nature and amount were such as would have made a delay in presentation to the debtor for a single three months a matter of surprise. By lapse of time the means of defense have been impaired and there is total want of excuse for the long delay by claimant. Under such circumstances, what does the law require at our hands? It is a well-settled principle in common-law jurisdictions, and a recognized one in civil-law countries, that obligations are to be enforced according to the *lex loci fori*, which here is the treaty and the public law. Beyond the requirement that its decisions must be according to justice, the treaty furnishes no guide to the commission respecting the operation of the lapse of time in extinguishing obligations. It is left to the direction of international law on the subject. Does that recognize the doctrine of such extinguishment as between states, in controversies like these? . . . It may be well preliminarily to note that, while individual interests are involved, these controversies, as elsewhere seen, are between states in some sense, and stand much as if so originating; and, further, that while the texts will be seen largely to relate to territorial acquisitions, the principles announced comprehend the acquisition and loss of personal property and pertain to other rights as well. . . . Prescription is a rule of inference; not necessarily perhaps that debts have been paid or titles granted, or other particular thing done, but that something at least has transpired which, in the natural order, as the civilians say, forms a basis and demand for its operation. It is no more the creature of legislative will than is any other induction. That the lapse of time, variant according to circumstances, needed to raise a rational presumption of a past occurrence happens to coincide in a particular case with the statutory period in that behalf, does not make prescription and statutory limitation one. They are always distinct. The former relates to substance, is the same in all jurisdictions, and aims at justice in every case, while the latter pertains to process, varies as a rule in all jurisdictions, and from time to time often arbitrarily in the same one, and admits occasional individual injustice. Lord Coke, as seen, thought prescription "abideth" at common law notwithstanding the "estate." . . . To withhold causelessly a demand for goods sold until the witnesses to the transaction and other usual means of ascertaining the facts have, in ordinary course, passed away, is negligent conduct; while to withhold a bond issued by public authority and of which presumptively a public register is kept for a like time after maturity may not be. . . .

Wharton in his second edition remarks (appendix to third volume): "While international proceedings for redress are not bound by the letter of specific statutes of limitation, they are subject to the same presumptions as to payment or abandonment as those on which the statutes of limitation are based. A government

cannot any more rightfully press against a foreign government a stale claim, which the party holding declined to press when the evidence was fresh, than it can permit such claims to be the subject of perpetual litigation among its own citizens. It must be remembered that statutes of limitation are simply formal expressions of a great principle of peace which is at the foundation, not only of our common law, but of all other systems of civilized jurisprudence."

The commission cited in support of its position the opinions of many law writers in addition to those above referred to, among others being Vattel, Phillimore, Hall, Polson, Calvo, Vico, Grotius, Wheaton, Taparelli, Sala, Sir Edward Maine, Brocher, Domat, Burke, and Markby.

**566.** The position taken by the above-named commission in the Williams case was followed in the Cadiz case (also cited as the case of Loretta G. Barbarie) (Moore, 4199; Report of Commission, 73), wherein it was said :

Time itself is an unwritten statute of repose. Courts of equity constantly act upon this principle, which belongs to no code or system of municipal judicature, but it is as wide and universal in its operation as the range of human controversy. A stale claim does not become any the less so because it happens to be an international one, and this tribunal in dealing with it cannot escape the obligation of a universally recognized principle simply because there happens to be no code of positive rules by which its action is to be governed.

**567.** Again, in the Driggs case (Report, 403) this commission used the following language :

Twenty-eight years had elapsed since the alleged wrong by the Colombian government and not a complaint had been made by Driggs! There is not a case on our list that better illustrates the wisdom of the prescriptive rule. The evidence is contradictory and the actual witnesses to the essential transactions on the part of the government had presumably passed away, for their evidence was not procured when the claim was asserted.

**568.** In the case of Corwin (Report of United States and Venezuelan Commission of 1889, 119; reported as the *Mechanic* in Moore, 3210), Little, commissioner, speaking for the commission, referring to the time of its last presentation, said :

Venezuela had then been a state thirty-three years. The demand was thirty-nine years old. It had been presented to the old republic and not allowed. Venezuela now could not be supposed to have anticipated its resurrection. The witnesses to the transaction in 1824 had presumably passed away, and other means of defense become dissipated. But owing to the possible incompleteness of the record in this regard, we prefer to base our conclusion upon the other ground stated, assuming proper and timely presentation of the claim against Venezuela.

569. Before the commissions sitting in Caracas in 1903 the question first arose in the Spader case, Bainbridge, American commissioner, speaking for the commission (Ven. Arb. of 1903, 161; Morris's Report, 325) and holding:

A right unasserted for over forty-three years can hardly in justice be called a "claim." . . . It is doubtless true that municipal statutes of limitation cannot operate to bar an international claim. But the *reason* which lies at the foundation of such statutes, that "great principle of peace," is as obligatory in the administration of justice by an international tribunal as the statutes are binding upon municipal courts.

570. This subject received more lengthy consideration in the Gentini case (Ven. Arb. of 1903, 720) above referred to than in any other before the Caracas commissions. In this case the claimant, seeking to recover for injuries inflicted upon him in 1871, did not appear before the Venezuelan authorities, or even ask the legation of Italy, his country, to make his demand until 1903, a period of thirty-two years. After distinguishing, as above indicated, between national rules of prescription and the principles of the same subject, and adding to the many international law authorities cited in the Williams case the names of Bello (*Derecho Internacional*, 42) and Bluntschli (*Droit International Codifié*, Sec. 279), the umpire referred to the civil-law writers, including Savigny (*Droit Romain*, Vol. V, Secs. 237 and 245), Troplong (*Droit Civil Expliqué*, title Prescription, Vol. I, 14), and Laurent (Vol. XXXII, 23, Sec. 12), as showing that prescription was a right of humanity. He found the common-law writers on prescription and the cognate title of laches reaching a like conclusion, and considered:

All the arguments in favor of it [prescription] as between individuals exist equally as well when the case of a national is taken up by his government against another, subject to considerations and exceptions noted at the end of this opinion. For may not a government equally with an individual lose its vouchers, particularly when, if any existed, they are in the hands of far-distant subordinate agents? If there be collusion between claimant and official, will not government witnesses die as readily as those of private individuals? If the claimant's own action be the cause of the misfortunes of which he complains, will not knowledge of the fact be lost with the flight of time? May the claimant against the government, with more justice than if he claimed against his neighbor, virtually conceal his supposed cause of action until its investigation becomes impossible? Does equity permit it? And this brings us to a further point. We are told with truth that this is a commission whose acts are to be controlled by absolute equity, and that equity will not permit the interposition of a purely legal defense as prescription is said to be. But is this position correct? As appears from the foregoing citations, the principle of prescription finds its foundation in the highest equity — the avoidance of possible injustice to the defendant, the claimant having had ample time to bring his action, and, therefore, if he has lost, having only his own negligence to accuse.

The umpire referred to the King & Gracie case (United States and British Claims Commission of 1853, Report, 309 ; Moore, 4179), to be hereafter discussed, as constituting a possible exception, as well as to the fact that in the Williams case, *supra*, it had been recognized that the time which would bar an account might not affect a bond as to which a public register had been kept. He also adverted to the fact that presentation of a claim to competent authority within proper time would interrupt the running of prescription.

**571.** Shortly after there was presented to the same umpire the Tagliaferro case (Ven. Arb. of 1903, 764), in which Venezuela insisted upon prescription as a sufficient defense. But the umpire said :

Here the acts complained of were committed pursuant to the orders of the highest military authorities of the state. The injured party at once appealed to the judicial authority, which denied relief, and then to the immediate representative of the nation, who, upon a subterfuge, refused his assistance. The responsible constituted authorities knew at all times of the wrongdoing, and if the complaint was baseless — an impossible conclusion under the evidence — judicial, military, and prison records must exist to demonstrate the fact. When the reason for the rule of prescription ceases, the rule ceases, and such is the case now.

**572.** About the same time there was also presented to the same umpire the Giacomini case (Ven. Arb. of 1903, 765), and, thirty-two years having elapsed, prescription was again invoked as a defense by the Venezuelan government. But the umpire said :

Examination of the *expediente* in the present case shows that the tribunal before which the proofs were made (in November, 1872), directed notice to the fiscal of the nation before their taking ; that he was present and vigorously cross-examined the witnesses ; that he asked and was accorded by the judge a copy of the evidence. The government knowing in this manner of the existence of the claim had ample opportunity to prepare its defense. As was stated in the Gentini case : " The principle of prescription finds its foundation in the highest equity — the avoidance of possible injustice to the defendant." In the present case, full notice having been given to the defendant, no danger of injustice exists, and the rule of prescription fails.

**573.** Quite extended consideration of this subject was given by Plumley, umpire of the British-Venezuelan Commission (Ven. Arb. of 1903, 327) in the Stevenson case, he stating in the course of his discussion :

When a claim is internationally presented for the first time after a long lapse of time, there arise both a presumption and a fact. The presumption, more or less strong according to the attending circumstances, is that there is some lack of honesty in the claim, either that there was never a basis for it or that it has been paid. The fact is that by the delay in making the claim the opposing party — in this case the government — is prevented from accumulating the evidence on its

part which would oppose the claim, and on this fact arises another presumption that it could have been adduced. In such a case the delay of the claimant, if it did not establish the presumption just referred to, would work injustice and inequity in its relation to the respondent government.

574. We have already referred to the fact that where the government possesses, or may properly be expected to possess, in its archives official records which would control the disposition of the claim, as in the case of bonds, claims for taxes and duties paid, etc., the principle of prescription may not be applied, and this consideration would have been amply sufficient to justify the opinion of Upham, American commissioner, speaking for the commission in the King & Gracie case (United States and Great Britain Claims Commission of 1853, Report, 309; Moore, 4179), wherein he said:

The first question arising for the consideration of the commission is, whether any legal bar on account of lapse of time exists against sustaining the claim for a return of duties. This seems now hardly to be contended for. Where a treaty is made between two independent powers, its stipulations cannot be deferred, modified, or impaired by the action of one party without the assent of the other. If the parties by their joint act, have established no barrier in point of time to the prosecution of any claims under a treaty made by them, then neither country can interpose such limit. The case admits of no other judicial construction. The legal advisers of the Crown concur in this view, and the commissioners have no doubt on the point. It is conceded, as a matter of fact, that an inequality in duties existed in violation of the provisions of the treaty; and, there being no bar to the recovery of the claim from lapse of time, such duties shall be refunded.

575. But negligence on the part of the claimant government in pressing for a disposition of a case to which the attention of the respondent government has once been directed cannot be invoked as a ground of prescription. This appears to have been first recognized by Sir Edward Monson, arbitrator of the Butterfield claim of the United States against Denmark, he saying (Moore, 1205):

The Danish government, on the other hand, argues in the first place that, setting aside the original merits of the case altogether, the amount of time which was allowed to elapse before the claim was first presented, and the intermittent manner in which it was subsequently pressed, constitute in themselves a conclusive objection to the validity of the claim. It appears convenient to settle this preliminary point at once; and the arbitrator has no difficulty in deciding that, although neither Butterfield & Company nor the United States government have used due diligence in the prosecution of the claim, and have thereby exposed themselves to the legitimate criticism of the Danish government on their dilatory action, the delay caused thereby cannot bar the recovery of just and reasonable compensation for the alleged injuries, should the further consideration of the merits of the case result in the decision that such compensation is due.



576. The same position was taken by Plumley, umpire, in the Stevenson case (Ven. Arb. of 1903, 327), which claim, it appeared, had been brought to the attention of the Venezuelan government in 1869, and it had announced to the representative of the British government that, owing to civil warfare, Venezuela could not attend to the arrangement or payment of it. Later it seemed that the case had been brought up before the Venezuelan government and placed among its list of "unrecognized" claims, after which time the British government had kept track of this claim with others of its class, waiting for such time as a general settlement could be made, and had taken advantage of the first opportunity to present it. The umpire said :

The delay has been either in the inability or the unwillingness of Venezuela to respond to this claim. The occasion of this unwillingness and the reasons why it was placed on the list of "unrecognized" claims are properly matters for proof and consideration before this commission, but it would be evident injustice to refuse the claimant a hearing when the delay was apparently occasioned by the respondent government. The umpire holds, therefore, that the case is properly before this Mixed Commission to be considered on its merits, and it is returned to the commission for that purpose.

577. In the Roberts case, before the American-Venezuelan Commission (Ven. Arb. of 1903, 142), Bainbridge, commissioner, speaking for the commission, said that the claim "was brought to the attention of the Venezuelan government within a few days after its inception. The essential facts which fixed the liability of Venezuela were not then and are not now denied. The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan government to reap advantage from its own wrong in failing to make just reparation to Mr. Quirk at the time the claim arose." The award was, therefore, given in favor of the claimant.

578. It has, however, been held that the defense of prescription is one to be pleaded, and in the Daniel case (Ven. Arb. of 1903, 507), Paul, Venezuelan commissioner of the French-Venezuelan Commission, in delivering an opinion, the results of which were accepted by his associate, said :

The reason upon which all legislations base the right of the debtor to invoke prescription as a means of extinguishing an obligation is the abandonment in which the creditor has for a number of years left the exercise of his right, the legal presumption of payment arising therefrom. Prescription has not been invoked before this commission in the present case by the government of Venezuela, wherefore it cannot of its own motion take it into consideration in conformity with the principles which govern.

## ACQUIREMENT OF TITLE BY POSSESSION

• 579. It is interesting to note that, in the treaty between Venezuela and Great Britain for the determination of the conflicting boundaries between British Guiana and Venezuela, the principles upon which the arbitrators should act were laid down as follows (Moore, 5018) :

*a.* Adverse holding or prescription during a period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.

*b.* The arbitrators may recognize and give effect to rights and claims resting on any other ground whatever valid according to international law, and on any principles of international law which the arbitrators may deem to be applicable to the case, and which are not in contravention of the foregoing rule.

*c.* In determining the boundary line, if territory of one party be found by the tribunal to have been at the date of this treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the tribunal, require.

580. In discussing the elements constituting sufficient possession to give title, the arbitrators between Austria and Hungary (*Revue de Droit International*, second series, Vol. VIII, 207), relying upon Heffter-Geffcken (*Das europäische Völkerrecht*, eighth edition, pp. 39 and 155) and Rivier (*Droit des Gens*, 1896, 182), held as follows :

Immemorial possession is one which has lasted for so long a time that it is impossible to furnish the proof of a different situation and which no person can remember having heard spoken of. Besides such possession should be uninterrupted and uncontested. It goes without saying that such possession should also have lasted up to the moment when the dispute and the conclusion of a *compromis* took place.

In the decision of the Hague Arbitral Tribunal passing upon the boundary dispute between Norway and Sweden affecting their north coast (*Revue Générale de Droit International Public*, 1910, Vol. XVII, 184-187), it was said, among other things, that according to a fundamental principle of international law, ancient as well as modern,

Maritime territory is necessarily a dependency of landed territory ; . . . that the partition of to-day should be made by tracing a line perpendicular to the general direction of the coast, bearing in mind the necessity of indicating the frontier in a clear and unquestionable manner in order to make its observance as easy as possible to the interested parties ; . . . that a demarcation which assigns the Grissbadarna to Sweden is supported by the combination of several circumstances and facts which have been brought out in the course of the discussion, of which the principal ones are the following —

*a.* The circumstance that the offshore lobster fisheries of Grisbadarna have been carried on since a time far more remote, and to an extent far exceeding, and by a far greater number of Swedish fishermen than of Norwegian fishermen.

*b.* The circumstance that Sweden has committed in the vicinity of Grisbadarna, particularly in recent times, many acts as the result of its conviction that these neighborhoods were Swedish territory, as for example the maintenance of buoys, making of soundings and the installation of a lighthouse, acts which necessitated considerable expense and in the exercise of which Sweden thought that she was not only exercising a right, but fulfilling a duty; while Norway, by its own admission in these regards, paid little or almost no attention to this territory. . . .

That concerning the circumstances of fact mentioned under *a*, under the law of nations, it is a well-established principle that it is necessary to abstain as much as possible from changing the order of things actually existing and of ancient origin; that this principle has a very direct application when private interests are involved, which, once put in jeopardy, could only be safeguarded efficiently by means of sacrifices on the part of the state to which the interested parties belong; that its [Sweden's] lobster fisheries, off the banks of Grisbadarna, are by far of the greater importance, and especially that it is the existence of these fisheries that gives the banks their value.

After summarizing other facts showing larger expenditures on the part of Sweden than on the part of Norway for expensive plants for fishing purposes, and with reference to the erection of buoys and lighthouses, as well as discussing the surveys and soundings made by Sweden which in comparison with those of Norway were more important, the tribunal found in favor of Sweden.

**581.** The American members of the Alaskan Boundary Tribunal under the treaty of 1903, referring to the exercise of sovereignty as constituting possession, said (Report, 49):

For more than sixty years after the treaty, Russia, and in succession to her the United States, occupied, possessed and governed the territory around the heads of the inlets without any protest or objection, while Great Britain never exercised the rights or performed the duties of sovereignty there, or attempted to do so.

Again (page 65):

Upon the purchase of Alaska by the United States in 1867, the officers of the United States took formal possession, with appropriate ceremonies, of the territories at the head of the Lynn Canal, and the officers of the Hudson's Bay Company surrendered the possession which they had theretofore held as tenants to Russia and departed, leaving the head of the Lynn Canal in the possession of the United States. From that time until the present the United States has retained that possession and has performed the duties and exercised the powers of sovereignty therein.

**582.** Bearing upon the same point of the exercise of sovereignty as constituting possession, in the arbitral decree of Victor Emanuel

over the question of the frontier between British Guiana and Brazil (Revue Générale de Droit International Public, Vol. XI, 1904, Documents, p. 18) it is said :

That the right of the United Kingdom of Great Britain, as successor to Holland, to whom the colony belonged, is based upon the exercise of the rights of jurisdiction on the part of the Holland West India Company, which, deprived of sovereign powers by the Dutch government, indulged in acts of sovereign authority over certain localities of the zone in litigation, governing commerce which for a long time was exercised by the Dutch, controlling it, submitting it to the orders of the governor of the colony, and succeeding in causing the indigenous inhabitants to recognize partially the power of this functionary; that these acts of authority and of jurisdiction with regard to the merchants and the indigenous tribes were continued in the name of the British sovereignty when Great Britain took possession of the colony belonging to Holland; that such an effective affirmation of the rights of sovereign jurisdiction gradually developed and was uncontradicted, and that it came to be accepted little by little even by the indigenous independent tribes inhabiting the regions which could not be regarded as included within the effective domain of the Portuguese sovereignty and thereafter of the Brazilian sovereignty; that in consequence of these successive developments of the power of jurisdiction, the acquisition of the sovereignty on the part of Holland at first and later on the part of Great Britain was effectuated over a certain part of the territory in litigation.

**583.** The same decision is interesting in its discussion as to what under certain circumstances constitutes insufficient possession, for it says :

The discovery of new traffic routes in regions which belong to no state, cannot be considered of itself a ground of sufficient efficacy for determining that the sovereignty of this region remains acquired by the state whose citizens have made the discovery; that to acquire sovereignty over a region not within the domain of any state, it is indispensable to effectuate its occupation in the name of the state which proposes to acquire the dominion; that occupation can only be considered as accomplished after the taking of actual possession, uninterrupted and permanent, in the name of the state, and that the simple affirmation of the rights of sovereignty, or the intention manifested to desire to render the occupation effective, cannot suffice; that the taking of actual possession of one part of a region, while it may be esteemed as efficacious for the purpose of acquiring the sovereignty of the entire region when this constitutes a single organism, cannot be esteemed efficacious for the acquisition of the sovereignty over an entire region when, on account of its extent or of its physical configuration, it cannot be considered as an organic unity *de facto*; that consequently, all things considered, one cannot admit as established that Portugal first and Brazil afterward have taken actual possession of all the contested territory, but one can recognize only that these states have put themselves in possession of certain localities of such territory, and that they have there exercised their sovereign rights.

**584.** Necessarily, perhaps, involved in this discussion is the question as to the proper bounds of actual possession, and we find it stated in the decision of the arbitrators between Austria and Hungary, above referred to, that "the opinion of the expert, in which the tribunal shares, rests upon the provisions of international law, which does not recognize rivers as having the character of frontiers, but accords it rather to mountains."

## CHAPTER XIII

### WAR

**585.** A definition of the term "war" does not appear to have been given by any commission, but war as a status has, of necessity, been repeatedly recognized; as, for instance, before the Costa Rica Claims Commission (Moore, 1561), where Bertinatti, umpire, in the case of Colden, Receiver, spoke of the conflict arising out of the Walker filibustering expedition as being "a public war and a regular war, fought as such on both sides according to the civilized usages of warfare, during about two years, which witnessed victories and reverses on both sides, as also the mutual recognition of all the rights of belligerents"; and in the Sambiaggio case (Ven. Arb. of 1903, 666, 680), where the umpire recognized war as an historic fact, saying that "for six months previous to the taking complained of in the present case a bloody and determined revolution demanding the entire resources of the government to quell it had been raging throughout the larger part of Venezuela."

The Hague Permanent Court of Arbitration, considering the Venezuelan Preferential case, apparently recognized resort to war to insure arrangements as to debts as properly creating a preference in the assailing nations.

**586.** As constituting a state of war in a given instance, the arbitral sentence of Queen Victoria under the agreement of 1843 in the matter of the dispute between France and England (*Recueil des Arbitrages Internationaux*, Vol. I, 59; Moore, 4866) said: "We are of opinion that after the departure of the French plenipotentiary from Mexico, and the notification which accompanied his departure, followed as well by the hostile operations on the part of the French against the fortress of San Juan de Ulúa, and the Mexican fleet, and the actual declaration of war by the Mexican government; and the expulsion of the French subjects from its territory, there was a state of war between the two countries and that the terms of the treaty and convention recognized its existence; consequently, that France is not bound to make restitution of, or give compensation for, the ships mentioned in the treaty; or for the ships and cargoes referred to in the second article of the convention."

## BELLIGERENT AND BELLIGERENCY

587. Neither do the terms "belligerent" and "belligerency" seem ever to have been expressly defined, but references to belligerent status are to be found in the opinion of Bertinatti, umpire, as above referred to (Colden, Receiver, etc., Moore, 1561), in which it appears that the United States "recognized the Rivas-Walker government, not only as belligerent, but as the regular government of Nicaragua"; and the use in the convention between the United States and Costa Rica of "the expression 'belligerent,' with the consequences depending upon it, the expression 'occupation by forces' (*occupatio bellica*), with the rights belonging to the military occupant, the acknowledgment of the authority of Costa Rica in the territory of Nicaragua (the penalty against the belligerent consisting in depriving him of action for indemnity before this commission), — all concur to show that the negotiators acknowledged the war between Costa Rica and Nicaragua as a *public war* and a *just war* on the part of Costa Rica, and thus acknowledged also the rights arising from the same. Consequently Costa Rica has no question of right to discuss with the *belligerent*, in accordance with said convention. For her the proof of the fact of belligerency is enough in order to oppose (i.e., set up) the want of any right of action, and say that the claimant has no *locus standi in judicio*."

The effect, if any, of the recognition of belligerency in an attempted revolutionary government upon the right of recovery against the national government for damages inflicted by such revolution receives consideration under the head of "Government — Liability for Acts of Unsuccessful Revolutionists."

LIABILITY OF FOREIGNERS TO LOSS AND DESTRUCTION  
INCIDENT TO WAR

588. That the alien residing in a state exposed to war is compelled to accept, together with the citizens of that state, for himself and for his property, the dangers incident to surrounding conditions and, no more than they, possesses a right to compensation therefor, has been well settled in numerous cases. (We refer to earlier chapter on "Aliens.")

The question repeatedly arose before the Mexican-American Commission of 1868, Thornton, umpire, in deciding the Blumenkron case (Moore, 3669), saying :

During the actual carrying on of hostilities the umpire does not consider that the property of a foreigner residing in the besieged city, more particularly when that is real property, can be looked upon as more sacred than that of natives. It is not shown nor has the umpire any reason to believe that any indemnity was granted to native Mexicans on account of similar damages; neither can the Mexican government be expected to compensate foreigners for damages done to their real property by reason of actual hostilities for the purpose of delivering the country from a foreign enemy. Those who prefer to take up their residence in a foreign country must accept the disadvantages of that country with its advantages whatever they may be.

589. So in the Schlinger case (Moore, 3671), Thornton, umpire, said that "even if the goods of the claimant were carried off by Carvajal's troops, he being considered a Mexican authority and having therefore the right and even the obligation to attack the city, the losses can hardly be looked upon otherwise than as one of the inevitable hazards of war."

The same view was taken in the Buentello case, Thornton, umpire (Moore, 3670), it being said by him: "The claimant knew that war existed, and might easily have withdrawn his property and retired into his own country; he preferred remaining in Texas and running the risks of the war and has consequently little to complain of."

590. In the Castel case before the United States and Venezuelan Claims Commission of 1889 (Report, 408; Moore, 3710) it was said:

Neutral property in a belligerent's territory shares the fate of war the same as that of subjects or citizens. If injured or destroyed in battle or siege, in the absence of circumstances evincing wantonness or culpable neglect on the part of the government within whose jurisdiction it is, the public law furnishes the owner no redress against such government. The case is not altered if the owner happens to be an officer of a neutral power.

591. In the Upton case, before the American-Venezuelan Commission (Ven. Arb. of 1903, 172; Morris's Report, 387), Bainbridge, commissioner, speaking for the commission, said:

It is evident from the claimant's own statement that the losses set forth in his memorial arose from the disturbed condition of the country, due to the civil war then existing in Venezuela, and not from any acts of the Venezuelan government or its agents, specially directed against the claimant or his property. Under these circumstances the claimant's privileges and immunities were not different from those of other inhabitants of the country. He must be held, in going into a foreign country, to have voluntarily assumed the risks as well as the advantages of his residence there. Neither claimant nor his property can be exempted from the evils incident to a state of war to which all other persons and property within the same territory were exposed.



Again in the same commission, American Electric and Manufacturing Company case (Ven. Arb. of 1903, 35 ; Morris's Report, 131), Paul, speaking for the commission, said :

The general principles of international law which establish the nonresponsibility of the government for damages suffered by neutral property owing to imperious necessities of military operations within the radius of said operations, or as a consequence of the damages of a battle, incidentally caused by the means of destruction employed in the war which are not disapproved by the law of nations, are well known.

He followed, however, by describing certain limitations upon this rule, to be hereinafter referred to.

So in the Dix case, Bainbridge, commissioner, for the commission (Ven. Arb. of 1903, 10 ; Morris's Report, 56), said, speaking of an American citizen, that "it is doubtless true that he was subjected to considerable inconvenience and expense ; but his rights and immunities in that regard are not different from those of other inhabitants of the country, and 'no government compensates its subjects for losses or injuries suffered in the course of civil commotions'" (Hall, fourth edition, 232).

592. Plumley, umpire of the Netherlands-Venezuelan Commission, in the Bembelista case (Ven. Arb. of 1903, 900) said :

There seems to be no question as to the facts being as alleged by the claimant [that the injuries were received by bullets during a retaking of the town by government forces], but these facts indisputably show that the injuries complained of were received at a time and under such conditions as to forbid any recovery from the government by the claimant. His injuries were received in the course of battle and in the rightful and successful endeavor of the government to repossess itself of one of its important towns and ports. The government owed a duty to the claimant and to all the inhabitants of Puerto Cabello to become the government in fact of the town in question. And as their repossession of it was resisted by the troops then in charge it became the due course of war to take and carry the entrenchments of the town. It was the misfortune of the claimant that his building was so near to one of the principal entrenchments, where there was the most serious resistance, and the injuries occasioned his property were one of the ordinary incidents of battle.

593. Gutierrez-Otero, umpire of the Spanish-Venezuelan Commission, in the Mena case (Ven. Arb. of 1903, 931) said that "in general, the state is not responsible for damages caused as a consequence of war because damages of this sort are considered as caused by *force majeure*, which exempts it from liability."

The doctrine as to assumption of risks, already abundantly illustrated, was also held by Alexander, arbitrator between the United States and

Nicaragua of the Orr & Laubenheimer case (Foreign Relations of 1900, 826).

594. The same rule obtains, of course, when the damages inflicted are incidental to warlike operations. For instance, in the Shattuck case, Thornton, umpire (Moore, 3668), said :

The damages and losses alleged by the claimant seem rather to be the result of the inevitable accidents of a state of war than to have arisen from a wanton destruction of property by Mexican authorities. It is alleged that the farm of the claimants was damaged by Mexican soldiers passing through it and injuring the crops, but it appears that both French and Mexican troops were on the spot at different times and that a Mexican army was encamped close to it for some time. Under such circumstances it would have been next to impossible for the general in chief of any army to have prevented encroachments upon private property, and this is a misfortune to which natives were exposed as much as foreigners, with the additional disadvantage that the former were generally forced to take up arms.

595. In the Cole case (Moore, 3670) the same umpire said :

The umpire is further of the opinion that the damage done to cotton crops by cavalry passing over them in the neighborhood of the scene of hostilities must be attributed to the hazards of war, and for which the government of the belligerent cannot be held responsible. A certain amount of wanton mischief is frequently committed by soldiers, especially when they are not highly disciplined, and this may have been the case in the present instance ; but the proportion is so small as compared with the damage done by large bodies of troops moving over cultivated lands, and it is so difficult to distinguish the one from the other, that it cannot generally, and certainly not in the present instance, be taken into consideration.

596. Lewenhaupt, umpire of the Spanish-American Commission, in the Wilson case (Moore, 3675) held that " the injuries complained of were the result of military operations in time of war, and for such injuries no indemnity can be claimed on the ground of international law."

597. Before the British-American Claims Commission (Hale's Report, 51 ; Moore, 3678), in the Cox case, a claim was disallowed for the destruction of a sawmill which had been engaged in the sawing of railway ties for the Confederate government, and in the Smythe case (Hale's Report, 51 ; Moore, 3678) a claim was disallowed for destruction of an iron and brass foundry, etc., which had been employed in manufacturing shot, shell, and other military supplies.

598. In the Volkmar case (Ven. Arb. of 1903, 258 ; Morris's Report, 538), Bainbridge, American commissioner, for the commission, said : " It is perfectly clear that the losses complained of were the result of military operations in time of flagrant war, and for such losses there is, unfortunately, by established rules of international law,

no redress. Such losses are designated by Vattel as 'misfortunes which chance deals out to the proprietors on whom they happen to fall,' and he says that 'no action lies against the state for misfortunes of this nature, for losses which she has occasioned, not willfully, but through necessity and by mere accident in the exertion of her rights.' . . . The rule that neutral property in belligerent territory is liable to the fortunes of war equally with that of subjects of the state applies in the case of civil as well as international war," citing the Cleworth case and Tongue's case before the British-American Claims Commission (Moore, 3675 ; Hale's Report, 49 ; Howard's Report, 22).

599. In the Petrocelli case, before the Italian-Venezuelan Commission (Ven. Arb. of 1903, 762), the umpire regarded certain damages "as incident to the operations of war," and rejected them.

#### ACCIDENTS OF WAR

600. Property destroyed by the accidents of war need not be compensated for, and it was so held in the Bercier case (Moore, 3706, Boutwell's Report, 112), and, as we have seen in other cases, no liability exists for its natural consequences, as was also held in the Genovese case (Ven. Arb. of 1903, 174 ; Morris's Report, 397), wherein damages were claimed for the stoppage of work not caused "by arbitrary action of the government of Venezuela, but by the natural consequences of the civil war, which were admitted by the same contractor as justified, as it appears from his correspondence with the Department of Public Works."

Nor are governments to be held to too close accountability, as was said in the Cesarino case (Ven. Arb. of 1903, 770), "for the misdirected shots of their soldiers or for every display of lack of judgment, but this is not to say that the existence of war frees them from every responsibility."

601. Nor will an allowance be made for property taken and destroyed in war without proof of appropriation by defendant nation, as was said in the Sterling case (Moore, 3686 ; Hale's Report, 45).

Again, as was said by the umpire in the Heny case (Ven. Arb. of 1903, 14, 25 ; Morris's Report, 97), losses incurred consequent upon the interruption of the ordinary course of business during a state of war, including loss of time, were not such as would constitute a claim for equitable compensation.

In the Duncan case (Reclamaciones Presentadas al Tribunal Anglo-Chileno, Vol. I, 536), responsibility was refused for the effects of shots misdirected in the course of a lawful bombardment. In the

Hübner case, before the same commission (Vol. III, 20), the accidental destruction of property through legitimate acts of war was held not to involve responsibility, and it was said that, while the sovereign could take such accidents into consideration if the state of its affairs permitted it, there was no recourse against the state for events of this nature not caused voluntarily but by necessity or by accident within the exercise of its rights. The same rule was again laid down in the case of the Club Inglés (*Ibid.*, Vol. III, 47) and in that of Dawson (*Ibid.*, Vol. III, 55).

**602.** In the Martini case, before the Italian-Venezuelan Commission (Ven. Arb. of 1903, 819, 846), the umpire declined to allow for an "unfortunate consequence of war for which the company can claim no personal indemnity," and refused to grant damages for "lack of pacific enjoyment of the thing rented" due to injury from trespassing resultant upon a state of war.

**603.** Somewhat akin in principle, upon the point last mentioned, to the Martini case was that of Grant before the British-American Claims Commission (Hale's Report, 162); who sought to recover for the breaking up of his lawful business by the "terrific shelling of the city of Petersburg" by the United States forces in 1864-1865, "which was so violent at times, during the period of ten months, that no business could be regularly and successfully conducted within the city limits." His claim was unanimously disallowed.

Likewise in the Money case (Hale's Report, 168) the commission unanimously disallowed a claim based upon cessation, during the war, of dividends upon shares in the Bank of Louisiana, such cessation being charged to have occurred in consequence of the Civil War.

**604.** Again in the Kerford & Jenkin case, before the United States and British Claims Commission of 1853 (Report of Commission, 351; Moore, 3788), recovery being sought for interference with business through military operations, Bates, umpire, said:

They knew that war was being carried on, and must also have been prepared for difficulties and hindrances incident to a disturbed state of affairs. The permission was not a privilege granted to them as British subjects, but was equally granted to other traders, citizens of the United States, who were placed in similar circumstances. It was a mere matter of favor on the part of the United States government to allow the trade to be carried on at all by claimants and other traders, and they embarked in it with a knowledge of the disturbed state of the country to which the adventurers were bound.

The umpire concluded that "the detention by which the alleged losses were occasioned arose out of the state of war, and was a

contingency incident to any trading adventure undertaken under such circumstances ; and that there is, therefore, no fair claim for compensation against the government of the United States."

TAKING OF PRIVATE PROPERTY OR NECESSARY DEVASTATION  
MUST BE ACCOUNTED FOR

**605.** The principle is not to be lost sight of, notwithstanding citations already given, that private property is not to be made the subject of unjustifiable seizure in time of war ; for, as was said in the *Macedonian* case (Moore, 1465), "according to the law of nations, private property is not seizable on land, whether it belongs to a neutral or an enemy," and the distinction between the cases where such property may, and where it may not, be seized is pointed out by Lieber, umpire, in the *Elliott* case (Moore, 3720), as follows :

General Corona had undoubtedly a right to appropriate Elliott's property, if necessary for the defense of the country against the French invaders, or to devastate it, if the war required it. The demands of war are even more absolute than those to save one's life, and, nothing appearing to the contrary, he was obliged to do it. But in all such cases it is expected that the government will repay for the injuries done as much as may be in its power, so that claimant seems to be fairly entitled to a compensation, however highly he may have estimated his losses in his valuation.

So in the *Henderson* case (Hale's Report, 44 ; Howard's Report, 40, 365, 368 ; Moore, 3728), a large amount of cotton being seized to be used for breastworks at Port Hudson, the majority of the commission, over the dissent of Frazer, American commissioner, granted compensation.

**606.** That private property taken for public use in time of war (even when it is completely under the conqueror's control) must be compensated for has repeatedly been held, and that the exposure of such property to special military dangers in which property in general does not share is in itself such a taking as requires compensation has been the view of several commissions. For instance, in the *Putegnât* case, Wadsworth, speaking for the commission (Moore, 3718), said :

General Avalos, commanding at Matamoras, in the service of the Mexican government, during the siege of that place in October, 1851, by Carvajal, seized the storehouse in which *Putegnât's* goods were on sale at the time, turned the storehouse into a fortification, from whence to resist and annoy the enemy, and forbade the removal of the goods to a place of safety. In the course of the contest the house was set on fire by the shells of the enemy and was destroyed. . . . To make the government responsible, the property must be taken by its

authority to be used against the enemy (to assist an attack or make good a defense, for instance) or destroyed or carried away to prevent the enemy from using it. This is what Vattel calls taking deliberately or by way of precaution. "As when a field, a house, or a garden, belonging to a private person is taken for the purpose of erecting on the spot a town rampart or any other piece of fortification, or when his standing corn or storehouses are destroyed to prevent their being of use to the enemy, such damages are to be made good to the individual, who should bear only his quota of the loss" (Book III, Chap. XV, Sec. 232; see also Grotius, Book III, Chap. XX, Sec. 7). Property taken or destroyed for the public use lawfully by the civil or military authorities must be paid for by the government (*Mitchell vs. Harmony*, 13 How., 115; *Hale vs. Lawrence*, 3 Zabriskie, 728; *Grant vs. United States*, 1 Court of Claims, 41).

607. In the *Bowen* case, Thornton, umpire (Moore, 3721), said:

The umpire considers that the claimant is entitled to compensation for the damage done to his house during its occupation by General Jauregin, and for the wounds which the claimant received when that general was attacked by Carvajal. General Jauregin was doubtless justified in self-defense in taking refuge in Bowen's house; but it was certainly his doing so which brought Carvajal's attack upon the house during which the claimant was wounded. The umpire therefore considers that he is entitled to compensation on both these accounts.

Similarly, the same umpire (Moore, 3722), in the *Marks* case, made an award to a claimant for goods taken for barricades, and in the *Hale* case (Moore, 3722) "for the damage done to his garden in the country by transforming it into a fortification. This measure," he said, "was taken by the orders of the Mexican government; but though the construction of such works may be a matter of necessity, a private individual who may suffer from it ought to be compensated for the damage done him."

608. In the *Jardel* case (Moore, 3699; Boutwell's Report, 123) the majority of the commission appear from their findings to have adopted, or at least to have decidedly approved, the following positions taken by the American agent:

Where two nations are at war, and the theater of war is upon the territory of one of the belligerents, and the belligerent upon the defensive, in actual battle, without having given special authority for the destruction of the particular property, either by specifying that property or by specifying a class to which it belongs, destroys the property of its own citizens or of alien residents, that government is not liable for the destruction; but if, in preparation for the battle, it orders the destruction of a class of property, in which is the property of A, or it orders the destruction of the property of A, whether it be a month before a battle or a day before a battle, or if, during the battle, it orders for any particular purpose the destruction of particular property of its own citizens, it is liable for the value of the property so destroyed. If, however, an army is engaged in operations upon the territory of the belligerent no liability of that sort arises. Everybody in that

country is an enemy, and whether the occupying army destroys property by specific declaration, or whether it destroys property in actual hostilities, it is alike free from all liability.

**609.** In the American Electric and Manufacturing Company case (Ven. Arb. of 1903, 35 ; Morris's Report, 131) it was held, following the Putegnat case, *supra*, that when the destruction of the neutral property is due to the previous and deliberate occupation by the government for public benefit, or is essential for the success of military operations, and the property has been destroyed or damaged by the enemy because it was occupied by the government troops and for that reason only, the respondent government should be liable, the opinion being rendered by the Venezuelan commissioner.

**610.** So in the Petrocelli case (Ven. Arb. of 1903, 762), it appearing that the government troops had intrenched themselves in front of the claimant's dwelling house at a street corner in Ciudad Bolívar, and that as a result a battle raged around that house for five days, it being made the object of attack and being greatly damaged, on the authority of Putegnat's case, *supra*, and of the American Electric and Manufacturing Company, *supra*, an allowance of damages was made for such as were considered the result of the special use made of it (the dwelling house) by the government.

**611.** In the Bertrand case (Moore, 3705 ; Boutwell's Report, 112), where property was taken by order of officers of the army and destroyed through fear that if not destroyed it would fall into the hands of the Confederates, although the United States contended that no liability should exist, because the property was destroyed in the theater of war and while hostilities were flagrant, an award was made against the United States.

In the Means, Executor, case (Moore, 3706 ; Boutwell's Report, 131), the property having been destroyed, on military order, in friendly territory, in order to give better range for guns, liability was admitted on behalf of the respondent government.

This general subject is largely discussed in Tchernoff's *Protection des Nationaux Résidant à l'Étranger*, quoted in the Mena case (Ven. Arb. of 1903, 931).

**612.** In the Baker case (Moore, 3668), Thornton, umpire, held the Mexican government responsible for articles taken by troops for the use of the Mexican army and so used ; and in the Johnston case (Moore, 3673) the same umpire allowed for damages done to crops of cotton, barley, and oats to the extent that he considered such damages not to have been called for by the requirements of war.

## ACTS OF TROOPS WITH AND WITHOUT OFFICERS

613. In order to hold a government responsible for the acts of troops, it has generally been held that they must be accompanied by officers, as otherwise no such relation of agency existed as would make a government liable. Thus in the Webster case, Thornton, umpire (Moore, 3004), said :

There is no doubt that the soldier who wounded Webster was under the immediate command of a Mexican officer, that the act was authorized by the officer, and that the Mexican government is therefore responsible for it. It is stated by some of the witnesses that the house in which Webster was at the time was invaded and occupied for the purpose of flanking the enemy. This may have been a necessity of war, but the wounding of Webster was not so. If the house was broken into merely for the sake of plundering, the act of wounding Webster was a wanton outrage, but was countenanced by an officer, so that the government became liable for it.

The same umpire ruled similarly in the Dunbar & Belknap case (Moore, 2998), wherein property had been plundered and destroyed, and in the Newton and Lanfranco cases (Moore, 2997), where soldiers under command of officers had robbed the claimant ; and the same rule was followed where acts of violence were committed by soldiers under official direction in the Standish and Parsons case (Moore, 3004), and in the Conrow case (Moore, 3004), all before the same commission.

In the Buentello case, Thornton, umpire (Moore, 3670), held that when " during time of war and in the enemy's country straggling soldiers and marauders go about robbing and destroying property, it cannot be considered that it is an injury done by the authorities of the country whose troops are invading," and, it not being " shown that any officer was present at the commission of any of the offenses charged, nor to what regiment they belonged, nor that they were under any control whatever," an award was refused.

So in the Schlinger case, Thornton, umpire (Moore, 3671), similar proof being lacking, and it not appearing even whether the plundering was done by common robbers, an award was likewise refused.

In the Tripler case (Moore, 2997) it was said :

It is not clearly shown by whom the acts were committed, or that they were done by order or in presence of an officer or officers, and if the robbery and destruction were committed by soldiers only, without the order or presence of an officer, the umpire does not consider that the Mexican government can be expected or called upon to make compensation for such acts. It is one of the unfortunate consequences of choosing to live in a country where revolutions and disturbances are so frequent.



**614.** In the Jeannaud case (Moore, 3000 ; Boutwell's Report, 105) the respondent government was held responsible for acts of destruction by soldiers in presence of their officers, such acts not serving any military purpose.

In the Latorre case (*Reclamaciones Presentadas al Tribunal Anglo-Chileno*, Vol. II, 88) the government was held responsible for articles taken because the soldiers stationed in the structure from which they were taken were under the command of their officers, who were under an obligation to see that the property of others was not seized by the soldiers, the omission of precautions constituting in itself negligence sufficient to involve the responsibility of the government.

**615.** In the Watkins and Donnelly, Administrators, case (Hale's Report, 45) the United States was held responsible for property pillaged by United States soldiers, upon proof showing great neglect of discipline on the part of their commanding officer and his neglect and refusal to take any steps for the surrender of the stolen property or the punishment of the offenders, and that a part, at least, of the property was then in possession of his troops.

**616.** In the Foster case, before the Spanish Commission (Moore, 2998), damages were asked for violence committed at the hands of persons who wore, at least in part, the uniform of the Spanish volunteers in Cuba. When they committed the acts in question, they were not acting under the command of any officer or engaged in any military duty. It was contended on behalf of the claimant that they were in fact Spanish volunteers, and as such were authorities of Spain within the meaning of the agreement of February 12, 1871. The advocate for Spain argued that the interpretation contended for would make every private act of every volunteer in the Spanish service the act of the authorities of Spain, and the commission dismissed the claim.

**617.** In the Castelain case (Moore, 2999 ; Boutwell's Report, 104), an attack having been made upon the claimant by private soldiers, the provost marshal being found on investigation to blame for not taking more prompt and effective measures to identify the offenders and bring them to punishment, and thereupon having been dismissed from service, the claims were disallowed by the unanimous action of the commission, who regarded the attack upon the claimant as having been instigated probably from motives of personal revenge, but considered that there was no act committed by the authorities creating a responsibility on the part of the United States.

**618.** In the Roberts case, before the American-Venezuelan Commission (Ven. Arb. of 1903, 142 ; Morris's Report, 286), Bainbridge

commissioner, speaking for the commission, declined to excuse the respondent government for acts of pillage committed by soldiers claimed to have been absent from the regiment and not under the direct command of their officers, because on the day following the outrage the claimant's intestate had complained directly to General Alcántara and stated to him "that the officer commanding the soldiers had replied to his appeal that his property and himself be respected, that he (the officer) was 'carrying out strictly the orders of General Alcántara.' It is clear from all the evidence that the troops were acting directly under the command of General Rodriguez, who in turn was acting directly under the orders of the civil and military governor of the state."

619. In the Henriquez case (Ven. Arb. of 1903, 910) an award was refused for what appeared to be "an unauthorized sacking and looting of the merchandise of the store" rather than "any taking of the goods for the purposes and uses of the army by direction and through the approval of the government officers."

In the case of Edgerton (*Reclamaciones Presentadas al Tribunal Anglo-Chileno*, Vol. I, 126) it was said by the majority of the commission to be a legal doctrine universally accepted that "acts of marauding and pillage by soldiers out of the ranks and away from the immediate control of their officers do not affect the responsibility of governments; that such acts are considered as common offenses, subject to ordinary criminal punishment."

620. In the case of Bacigalupi before the Chilean-American Claims Commission of 1897, case No. 42, a majority of the commission, in excusing Chile from liability, said that "even assuming, however, that the destruction of this property was not owing to military operations, no evidence has been presented to show that it was destroyed by soldiers in the presence of or authorized by their officers or in the presence of officers who could have restrained them but did not make the necessary effort to do so; nor is there anything to prove wanton destruction or neglect on the part of the authorities in command, or that the loss was occasioned by the intention or default of Chilean officers." A dissent was filed by Gage, American commissioner, principally upon the ground that, as he contended, it was "evident that no attempt was made by the commander in chief to restrain his forces."

621. A number of cases have arisen because of complaint of acts of pillage or disorder immediately consequent upon or apparently incident to an attack upon a town. Several of such were decided by

Thornton as umpire of the Mexican-American Commission under the treaty of 1868. In the Vesseron case (Moore, 2975), he held that the condition of the proof was such as to lead "to the inference that there was no officer in command of those soldiers or present during the pillage; and as it appears that a fight was going on in another part of the town, it was probably out of the power of either of the commanders of the contending forces to put a stop to the plundering of Vesseron's store."

So in the Dresch case he declined to hold Mexico liable for losses (Moore, 3669) "because they arose during the capture of a town from the enemy and must be attributed to the hazards of war; because it is not proved that the robbery complained of was anything more than an act of pillage by uncontrollable soldiery, or was committed with the countenance of authorities or officers. The circumstance that an officer attempted to cause the restitution of the property is no proof that the restitution was possible, or that the culprits were not punished, or would not have been so if they had been identified."

In the Michel case (Moore, 3671) the same umpire found absence of proof that the destruction was carried out "by the orders of Mexican authorities or even in the presence of an officer, and under these circumstances, and as the occurrence took place during the disorder and tumult which accompanied the assault and capture of the town occupied by the enemy, the umpire disallowed the claim."

Again, in the Weil case (Moore, 3672), it appearing that the officers had lost all control over the men and that the sacking of the town was general, natives suffering equally with foreigners, and it not being shown that the former were ever compensated for such losses, the umpire refused compensation.

So also in the Antrey case (Moore, 3672), Thornton, umpire, found that during or immediately after the attack the town was pillaged and a number of houses sacked, among which was that in which the claimant lived; but there was no proof whatever that the sacking of the town was done by the order of or was even countenanced by the commander of the forces. The inference he drew from the evidence was that the acts complained of were committed by uncontrollable soldiery, from whose violence the natives suffered as much as the claimant. Relief, therefore, was refused.

In the Cooper case (Moore, 4039), discussing the matter more at length and laying down general rules, Sir Edward Thornton said:

According to the strict rules of war, a belligerent cannot be held responsible for the value of property belonging to residents, whether natives or foreigners,

which has been seized or destroyed in a place previously occupied by and captured from the enemy; and though it is more in accordance with the rules of modern and more civilized warfare to respect the property of private persons, whether natives or neutral foreigners, it is doubtful whether an international claim can be sustained on account of the violation of these rules. In the present instance, the umpire is of opinion that the principal portion of the claim arises from the inevitable cause of war. The pillage and destruction were general and seemed to have been directed against natives as well as foreigners. Neither is the umpire of opinion that there is any proof of the charge that the commanders and officers of the force countenanced or participated in the plundering of the claimant's property.

**622.** Wadsworth, umpire, speaking for the same commission in the Friery case (Moore, 4036), said :

I cannot deny the right of the government of Mexico to assail and capture a town held by its enemies, and do not see how the government is to be made responsible for the disorders which accompany a successful assault upon such a town, committed upon persons or against the property of persons who are at the time enemies, when I am sure it was impossible for the parties in command to restrain these disorders. These were the hazards of war, and claimant, residing in the town where the contest rages, must share the fortunes of the rest of the inhabitants. His small effects were plundered in the earlier moments of the capture of the place, and before the authorities possessed the means or had the time to restore order and preserve discipline.

In the Barnett case, before the Anglo-Chilean Commission (Report, Vol. I, 443), it being considered that the government had done all it could to preserve order immediately following a successful assault, it was held not responsible for disturbances resulting from the over-excitement of the populace, no liability existing toward foreigners when a portion of the people had withdrawn from governmental authority because of insurrection, civil war, or local disturbances. The British arbitrator dissented on the ground of want of due diligence on the part of the government in suppressing disturbances.

**623.** In the British-American Claims Commission, under the treaty of 1871 (Moore, 3688; Hale's Report, 45), in the case of Hayes, an award was refused for pillage merely, and so also in the cases of Grace, Bostock, and McMahon, where the acts seem to have been those of unauthorized pillage.

So in the Cleary case (Moore, 3688; Hale's Report, 162), an assault being committed by a private soldier, out of the presence of an officer, the government was discharged of responsibility.

**624.** The French-American Claims Commission followed the same rule in the Vidal case (Moore, 2999; Boutwell's Report, 111), refusing payment for losses due to unauthorized acts of pillage, it being held, as it was understood by the majority of the commission, that

specific authority for the taking must be shown, or it must appear from the evidence that the articles taken were appropriated to the use of the army, and that they were such as were necessary for its support.

**625.** In the Henriquez case, before the Netherlands-Venezuelan Commission (Ven. Arb. of 1903, 910), it was said that "so far as the facts are stated it would appear more to be an unauthorized sacking and looting of the merchandise of the store than of any taking of the goods for the purposes and uses of the army by direction and through the approval of the government officers. There is no proof that the injuries done to the building were in consequence of, or as an incident to, the occupancy of said building as a place of rendezvous under official orders, but it has more the appearance of reckless and un-directed action of ungoverned soldiery."

Attention is called to the fact that the convention of the Hague Conference of 1907, respecting naval bombardment, provides, in Chapter II, Article 7, that "a town or place, even when taken by storm, may not be pillaged."

#### BOMBARDMENT

**626.** The liability to which governments may or may not be held in the event of bombardment received elaborate discussion in the Bembelista case before the Netherlands-Venezuelan Commission (Ven. Arb. of 1903, 900). After quoting the following rules laid down in Article 32 of the Manual of the Institute of International Law,—"It is forbidden: (a) To destroy private or public property if that destruction is not compelled by the imperious necessity of war; (b) To attack and bombard localities which are not defended,"—the umpire continued:

... The better rule seems to be that the bombardment of an open city—that is to say, one which is not defended by fortifications or other means of attack or resistance for immediate defense, or by detached forts situated in its proximity—for instance, at a maximum distance of 4 to 10 kilometers—is inadmissible in ordinary cases. But an unfortified town may be bombarded for the purpose of quelling armed resistance. Since this was a fortified town, of course the rule prohibiting bombardment in general does not apply, and if the bombardment of unfortified towns were permissible under the circumstances named, much more would it be true that towns intrenched, as was Puerto Cabello at the time complained of, might be attacked and bombarded without just cause of complaint.

In support of the rules laid down by him the umpire further quoted Lawrence on International Law, 334 and 443; Wharton, Vol. III, Sec. 349, p. 338; Lawrence's Report, 274 and 275.

**627.** In the American-Venezuelan Commission a claim made by the American Electric and Manufacturing Company (Ven. Arb. of 1903, 36; Morris's Report, 131) was rejected as follows:

With reference to the second section of the claim for the sum of \$2000 for damages suffered by the telephonic company during the bombardment of Ciudad Bolívar in August, 1902, these being the incidental and necessary consequences of a legitimate act of war on the part of the government's men-of-war, it is therefore disallowed.

It is noteworthy, however, that, on an examination being made as to the facts attendant upon this particular bombardment, it appearing to another umpire (De Lemos case, Ven. Arb. of 1903, 302) that some 1400 or 1500 shells were thrown by the Venezuelan gunboats into the very heart of the city, which was unfortified, the opinion was plainly intimated that the claimant had a right to recover. See also reference to the Barletta case, not reported, but discussed in the Guerrieri case (Ven. Arb. of 1903, 753), the umpire expressing his approval of the rule that liability would exist where government vessels had thrown a large number of shells into a town without directing its attack upon the quarters of the revolutionary troops, without any supporting forces to make the bombardment effective, and when the city had not broken out in insurrection, but a body of troops had defaulted in their allegiance. In the Guerrieri case, *supra*, however, there was no statement before the umpire except that shells had been thrown in the course of an attack, one of them injuring claimant's property; and upon this averment of a single fact, a state of war existing, the umpire was not justified in assuming that the act was needless or unjustifiable. The legal presumption would be, he added, in favor of the regularity and necessity of the governmental acts.

**628.** Before the French-American Claims Commission the questions now under discussion several times arose. In the Dutrieux case (Moore, 3702; Boutwell's Report, 116) a claim was presented for injury to houses by shells thrown during the bombardment of Charleston by the forces of the United States. It was urged that the destruction was upon the theater of war and consequent upon the necessary movements and acts of the belligerents, and not, therefore, the subject of compensation. The claim was disallowed.

**629.** A like question arose in the Donaldsonville cases (Moore, 3697; Boutwell's Report, 117, 125). The commission said:

That the acts of bombardment and burning by Admiral Farragut were lawful and justifiable acts of war, caused by the firing of the Confederate military forces, with the complicity of the inhabitants of Donaldsonville, upon the transports of

the United States passing upon the [Mississippi] river, and that the government of the United States is not bound to make compensation for the damage caused by such burning and bombardment.

From this opinion the French commissioner absolutely dissented, upon the ground that the proof submitted was insufficient to sustain the statement of facts above given upon which the commission acted (Moore, 3697; Boutwell's Report, 228).

630. The same matter was discussed before the British-American Claims Commission (Moore, 3675; Hale's Report, 49; Howard's Report, 22), in the Cleworth case, the commissioners declining to hold the United States responsible for the value of a house destroyed in Vicksburg by shells thrown into the city by the United States forces during the bombardment; and they followed the same rule in the Tongue case, where injuries were claimed for the bombardment, sacking, and pillaging of Fredericksburg on the 11th, 12th, and 13th days of December, 1862.

631. In the case of Cuneo, Señor Lopez Netto held Chile to liability in the British-Chilean Commission appointed under the treaty of 1883 (Moore, 4928), where the Chilean men-of-war had bombarded the Peruvian port of Pisagua, — the reason for the award, as stated by him, being that the object of the operations of the Chilean men-of-war was to destroy some small trading vessels in the port, and that this might have been accomplished by some shots directed at the vessels, or by means of a demand addressed to the authorities; that Pisagua was an open town without fortifications, artillery, or other serious means of defense; that the population was almost exclusively composed of neutrals engaged in commerce (a circumstance of which the commander of the Chilean forces could not have been ignorant); and that such garrison as there was, was so placed that to attack it a bombardment of the town was not necessary, but nevertheless took place without summons, notification, or warning. In the opinion of Calvo (*Le Droit International*, fourth edition, Vol. III, 459, 461) the umpire's views were "liberal and conformable to the laws of nations."

The Commission under the treaty of 1893 gave the subject consideration in a number of cases, among them that of Perkins (*Reclamaciones Presentadas al Tribunal Anglo-Chileno*, Vol. I, 34), in which it was held that it might be affirmed that Iquique was not, on February 19, 1891, an open and undefended city such as international law counsels should not be bombarded, but was a city occupied in a military manner by the enemy, who not only had sought to recover it by a *coup de main*, but also had organized a stubborn resistance

against those who had previously had control of the city ; that international law recognized the right of bombarding a nonfortified city which was occupied in a military manner and which resisted ; that this right was with greater reason recognized when the city had been occupied by surprise and the invading army had endeavored to dislodge its enemies ; that the principle generally accepted in international law, by which the bombarding of a city cannot take place without previous notice, was not applicable to the case which supposed a city occupied by the enemy, to whom its adversary gives notice that it is disposed to bombard it to compel capitulation in the shortest possible time ; that it would have been impossible for the Chilean squadron to give previous notice to the inhabitants of Iquique, since the enemy had possessed itself of the city by surprise, and that it was its duty to take all the military measures necessary to protect the troops that had been embarked before the attack, and to maintain itself in possession of the city ; that this was a case of " attack in force " which Article 16 of the International Declaration Concerning the Laws and Usages of War, of the Conference at Brussels in 1894, exempts from the requirement of previous notice. The same doctrine was affirmed in the Watson case (*Ibid.*, 486) and numerous other cases before the same commission.

**632.** We close the discussion of this subject by referring to the following provisions, affecting private individuals, of the treaty respecting naval bombardment formulated by the Hague Conference of 1907 :

Article 1. The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden. A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbor.

Article 3. After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question. These requisitions shall be in proportion to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in cash ; if not, they shall be evidenced by receipts.

Article 4. Undefended ports, towns, villages, dwellings, or buildings may not be bombarded on account of failure to pay money contributions.

#### BLOCKADE

**633.** More considered than any other subject in connection with blockades has been the possibility or otherwise of their existence by paper or proclamation, an expedient frequently resorted to, particularly by the national government in the event of revolution.



The subject came up before the British-Venezuelan Commission in the Asphalt Company case (Ven. Arb. of 1903, 331, 336), the circumstances being peculiar. A Venezuelan consul had refused clearance to a British vessel, the ports to which clearance was desired being in the hands of the revolutionists, and their closure having been attempted by proclamation not supported by a naval force. The umpire said :

To close ports which are in the hands of revolutionists by governmental decree or order is impossible under international law. It may in a proper way and under proper circumstances and conditions in time of peace declare what of its ports shall be open and what of them shall be closed. But when these ports or any of them are in the hands of foreign belligerents or of insurgents, it has no power to close or to open them, for the palpable reason that it is no longer in control of them. It has then the right of blockade alone, which can only be declared to the extent that it has the naval power to make it effective in fact.

The umpire cited, in support of his position, among other authorities, Lawrence, 584 ; Wharton, International Law Digest, Vol. III, Secs. 359-361 ; Glass, Marine International Law, 105-107 ; Hall, International Law, 727.

**634.** A like ruling was given by Duffield, umpire of the German-Venezuelan Commission, in the Orinoco Asphalt Co. case (Ven. Arb. of 1903, 586), based upon facts somewhat similar in their origin. To the same effect was the *Topaze* case (Ven. Arb. of 1903, 329), the De Caro case (Ven. Arb. of 1903, 810), and the Martini case (Ven. Arb. of 1903, 819), a note to the latter case citing (page 842) the convention of Paris of 1854 providing : " Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire maintenus par une force suffisante pour interdire réellement l'accès du territoire ennemi."

**635.** The subject received much consideration in the cases of the ships *Boyne*, *Monmouth*, and *Hilja* (Moore, 3923 ; Hale's Report, 150), the commission making an award in favor of the claimants in the cases of the *Boyne* and the *Monmouth*, Frazer, American commissioner, dissenting in the latter case only on the question of amount, but filing an opinion from which we take the following :

In these cases the warning was by a vessel blockading Charleston and off that port *before* there was any actual blockading force off Savannah, and was indorsed thus : " Boarded, informed of the blockade, and warned off the coast of all the southern states by the United States steamship *Niagara*, May 12, 1861. Edward C. Potter, Lieutenant United States Navy." This warning was not, and is not, disavowed. It must therefore have the same effect as if the officer giving it had been expressly instructed by the highest authority to give it in that form. It must be regarded as the act of the United States, and was notice to the vessel that all

the southern ports embraced within the proclamation were then actually blockaded, and that any subsequent attempt of the vessel warned to enter any of such ports would result in capture. A vessel bound for Savannah, thus warned, it is true, might have disregarded the warning, and could lawfully have proceeded to Savannah because there was not in fact any force blockading that port. If captured she would unquestionably have been discharged with damages by the prize court. But must the neutral merchantman run the hazard of attempting to enter Savannah? Had she found there an actual blockade and been captured, her previous warning would have been good, and her condemnation as good prize would have been certain. There is in the facts every element of a strong obligation upon the United States, and in favor of a vessel which, on the faith of the warning given, fully respected it, and by so doing suffered loss, to make good that loss. The neutral vessel, ignorant as to the facts, had a right to act upon the warning; and I am compelled to hold that, in doing so, she acted with all prudence and propriety, and that, judging, as her captors must at the time, any other course would have been rashness and folly. A regard for the interests of his owners, as well as respect for the United States, required that the master should abandon any purpose to enter Savannah.

**636.** The Belgian and English arbitrators of the claim of the bark *Chépica*, under the British-Chilean convention of 1893 (Moore, 4934), said :

That the measure taken by the government of President Balmaceda regarding the bark *Chépica*, destined to a port in the north of Chile, is invested with the character of a ruler's decree, which is but one of the forms of embargo . . . ; that if the government has the right in time of war, in the interest of its own defense, to detain neutral vessels in its ports, and refuses them authorization to proceed to certain ports which are declared closed, the exercise of this right not only involves its moral responsibility, but also its real responsibility, whenever the case has been provided for in an international treaty, a circumstance which exists in the present case; that otherwise there would result, at least as regards vessels which are in the ports of the country that are not closed and destined for ports which are closed, the establishment of a paper blockade prohibited by modern international law.

And further, as was said by Lord John Russell, and quoted approvingly by Hall (International Law, 37, note) : " In the event of insurrection or civil war in that country, it was not competent for its government to close ports which were *de facto* in the hands of the insurgents, and . . . such a proceeding would be an invasion of the international law relating to blockade." Inasmuch as the treaty had provided, in the event of an embargo, for reference to special arbitrators, whose duty it was, in case of disagreement, to fix the amount of indemnities, and since, consequently, the arbitrators had no authority to give the decision, they declared themselves without jurisdiction.

The same tribunal in the cases, among others, of Williamson, Bal-four & Co. (*Reclamaciones Presentadas al Tribunal Anglo-Chileno*, Vol. III, 335), ship *St. Mary's Bay* (*Ibid.*, Vol. III, 557), bark *Royal Alexander* (*Ibid.*, Vol. III, 587), held that to permit to the government the right in time of war and in its own interest to detain in its ports neutral vessels, and to refuse them authorization to proceed to certain ports declared closed by it, would constitute a fictitious or paper blockade, contrary to the principles of international law, such ports being at the time in the hands of insurrectionists.

637. Where, however, there was an effective blockade, and it was the intention of the masters of the vessels to run it, but it was contended on their behalf that they were entitled to formal notice and warning by a blockading vessel before they could be subjected to capture, the British-American Claims Commission (*Steamship Sunbeam et al.*, Hale's Report, 127; Moore, 3159) unanimously disallowed the claim.

So in the cases of Laurie, Son & Co., Irvin & Company, and O'Connor (Moore, 2987; Hale's Report, 58), where damages were sought because an effective blockade had prevented the removal of the plaintiff's goods and there was resultant loss, the same commission, without hearing argument from the United States, unanimously disallowed the claims.

Nevertheless, in the cases of the bark *Hiawatha* and others (Moore, 3902; Hale's Report, 130) the majority of the commission allowed the claims on the theory that vessels within a blockaded port should receive reasonable notice and an opportunity to leave the port without being subject to capture, in this decision the majority of the commission accepting the view of the minority of the Supreme Court in the cases relating to the same vessel (*Prize Cases*, 2 Black, 635, 699).

638. The legality of an effective blockade was recognized in the Duncan case, before the Anglo-Chilean Commission of 1893 (*Reclamaciones Presentadas al Tribunal Anglo-Chileno*, Vol. I, 536), wherein it was held that an "effective blockade previously notified to neutral vessels is a legitimate act of war, and that consequently the government proclaiming it cannot be held responsible for its consequences toward neutral vessels which have had an opportunity to direct themselves toward another port; that no government is obliged to pay indemnity for delays to neutral vessels operating on account of third parties unless it has delayed them in their ports in an irregular manner, using measures vexatious and contrary to international law; and that no responsibility is occasioned when it interferes with their

loading or discharge in consequence of a war or internal political disturbances." A like rule was laid down by the same commission in the case of the *British Army* (Ibid., 386) and in other cases.

639. Inferentially the question has arisen before the Hague Permanent Court of Arbitration as to whether such a thing as pacific blockade may exist. It was contended in many quarters that there was no state of war existing between Venezuela on the one hand and England, Germany, and Italy on the other growing out of the blockading measures of December, 1902, and January, 1903; but in the decision of the high tribunal referred to it is said (Penfield's Report, 108) that "after the war between Germany, Great Britain and Italy on the one hand and Venezuela on the other hand no formal treaty of peace was concluded between the belligerent powers." A like interpretation of the condition so existing had been given by the umpire in the *Sambiaggio* case (Ven. Arb. of 1903, 689), he holding that, at the time the protocol for the settlement of the Venezuelan claims and references to The Hague was signed, "relations between Italy and Venezuela were so far broken that, as shown by the language of the article, it was necessary to 'renew and confirm' the old treaty."

#### CONTRABAND OF WAR

640. In the *Gonzales* case, Thornton, umpire of the Mexican-American Commission, under the treaty of 1868 (Moore, 3885), treated lead as contraband of war and liable to seizure. The lead was seized March 15, 1866, the President not issuing his proclamation for the removal of restrictions on commercial intercourse until May 22, and not declaring that the insurrection theretofore existing in the state of Texas was at an end until August 20, 1866.

641. In the Geneva Arbitration determining the *Alabama* awards, the question arose as to whether coal was contraband. Under the second rule, providing that a neutral government was bound "not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other or for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men," it was held (Moore, 4100) that "in order to impart to supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character."

**642.** In the cases of the *Le Mores* (Moore, 3311; Boutwell's Report, 96) the majority of the French-American Claims Commission made an allowance against the United States, Judge Aldis, the American commissioner, dissenting, among other points, as to what constituted contraband of war, and in his opinion saying :

Notwithstanding the conflicting decisions of the courts, and the more conflicting opinions of the writers upon international law, I think that the gray cloth furnished by the claimants should upon principle be held to be contraband of war. It was furnished voluntarily upon express contract with the government of the Confederate States for the use of the army. Its destination was for some port of the Confederacy nearest to Richmond, if possible. It was called in the correspondence "army supplies." It was a direct and necessary aid for carrying on the war. These are the elements which upon principle constitute contraband goods. The doctrine and policy of nations as to what is and what is not contraband advance and recede according to their necessities as belligerents or their interests as neutrals; but the doctrines of international law must stand upon principle to command the assent and respect of mankind.

#### PROPERTY TAKEN BY PRISONERS FOR THEIR SUPPORT

**643.** An unusual case was that of *Evertsz* before the Netherlands-Venezuelan Commission (Ven. Arb. of 1903, 904), wherein a number of prisoners had been placed by the governmental authorities upon an island to which the claimant had a concession, and left there without any means of maintenance. For their own subsistence they took and consumed the property of the claimant, and Venezuela was held responsible for all property so necessarily taken.

#### ARREST UPON SUSPICION IN TIME OF WAR

**644.** That arrests upon suspicion in time of war will not serve as foundation for claims for damages has been repeatedly decided. In the *Hannum* case, before the Mexican-American Commission under the treaty of 1868 (Moore, 3243), Wadsworth, commissioner, speaking for the commission, said that the "claimant seems to have had a fair hearing and a reasonably prompt acquittal and discharge. . . . I do not think the action of the authorities in the premises, under the surrounding circumstances of alarm and danger, created by the action of citizens of the United States, forms any just ground of claim by the United States."

So in the *De Rijon* case (Moore, 3438), exclusion of a suspicious person from the military lines was held permissible by Sir Edward Thornton, umpire of the same commission, who in the *Cramer* case

(Moore, 3250) justified an arrest and detention for the purpose of inquiry into the grounds of suspicion. In this case the umpire did not think thirty-five days was an unreasonable time for making the inquiries, considering that it was likely that they were partially made at a great distance.

**645.** So in the Berron case (Moore, 3960) the commission recognized the right of detention of a vessel in order that doubts might be solved, but held that a refusal to discharge the vessel after the suspicions had been shown to be unfounded was wrongful, and allowed damages.

**646.** In the case of the bark *Emily Banning* (Moore, 3251), which arrived at Acapulco in distress and was detained and her captain and crew imprisoned on suspicion of being filibusters, an award was made because the detention was long and imprisonment harsh.

**647.** Before the Peruvian Commission, Herran, umpire, in the Sartori case (Moore, 3122) justified an arrest on suspicion where the claimant had gone out of a city in a state of siege wherein were stationed the chief of the revolutionary government and the greater part of his army, carrying written communications and a large sum in paper money, the property of the enemies of the government, toward a port occupied by their troops; and he held that in so doing the officers of the government acted according to the laws of war and did not violate the guaranties which the citizens of the United States enjoyed in Peru.

**648.** In the Story case, before the Spanish Commission (Moore, 3270), Lederer, umpire, held that there was no relief for a wrongful arrest had in time of war, treating it as a misfortune incident to that state, and considered that the claimant must submit to such so far as was necessary to secure an investigation of his case; but that he, having been ill treated to an extent not required to secure his arrest and investigation, and having afterwards been declared innocent, was entitled to an indemnity.

**649.** In the Forwood case (Hale's Report, 84) the claimant, having by his expressions and conduct exposed himself to suspicion, and being detained in the office of the chief of police of New York for some three or four hours, was refused damages by the majority of the British-American Commission; and in the case of Jarman et al. (Moore, 3308; Hale, 84), who were the master and passengers on board the British steamship *Peterhoff*, captured as a prize, and who were detained as witnesses, their claims were disallowed, as was the claim of Dean (Moore, 3309; Hale's Report, 85), where the facts were quite similar.

650. In some cases, perhaps distinguishable from those to which reference has already been made, relief has been refused for disorders arising out of a state of war. For instance, in Gatter's case (Moore, 3267), Thornton, umpire, refused compensation where the claimant had been summoned or arrested several times and taken before the military authorities in Mexico during a state of war, the cause of the arrest being the desire of the authorities to purchase a piece of property which they wanted to use. The umpire said that such occurrences were common in a state of war, and no one ever thought of making claims for them.

651. In the Sumpter case before the same umpire (Moore, 3267), where the claimant had suffered with others a detention in consequence of a general military measure, it was held that there was no just ground for a claim.

#### ARMISTICE AND PEACE

652. The effect of an armistice was touched upon by Lieber, umpire, in the Torres case (Moore, 3801), he remarking that "suspensions of hostilities, armistices, even the mere mitigation of energetic hostilities, are no spontaneous acts, like the efforts or suspensions of activities of nature. Orders to such effects must be given. No officer or soldier can act on hearsay or rumor." In the same opinion, after discussing the nature of the particular acts complained of, he expressed himself as follows :

Hostilities frequently cease, but by no means always, when commissioners of the belligerents meet to treat about a peace to be concluded. How is it, however, when a treaty of peace has been signed, but has not yet been ratified? Many of the best authorities hold that peace begins *de jure* when it is signed, and not from the day when it is ratified by the two supreme belligerent powers or the authorities which by the law of the land have alone the right to ratify. This, however, is far from being unconditional. If a peace were signed with a moral certainty of its ratification and one of the belligerents were, after this, making grants of land in a province which is to be ceded, before the final ratification, it would certainly be considered by every honest jurist a fraudulent and invalid transaction. But it is well understood that a peace is not a complete peace until ratified; that, as a matter of course, the ratifying authority has the power of refusing unless, for that time, it has given up this power beforehand, but there can be no doubt that so soon as peace has been preliminarily signed active hostilities ought to cease, according to the spirit of civilization and consistent with the very idea and object of the whole transaction, which is to stop the war and establish peace. It would be an unjustifiable act to continue vehement hostilities under such circumstances as if nothing had happened, wherever it is possible, and when the contrary is not plainly understood or actually expressed.

**653.** In the case of the schooner *John*, Upham, American commissioner, — Hornby, British commissioner, coinciding with the conclusions (Moore, 3793; Report, United States and Great Britain Claims Commission of 1853, 432), — said that, "when there is a want of due diligence in advertising the cessation of hostilities, the injured party is clearly entitled to indemnification; and Vattel says, also, 'that those who shall, through their own fault, *remain ignorant of the publication of the truce*, would be bound to repair any damage they may have caused contrary to its tenor'" (Vattel, Book III, Chap. XVI).

#### MILITARY OCCUPATION AND MARTIAL LAW

**654.** The effect of military occupation has received little consideration by arbitral tribunals, the most extended discussion of the subject having been given by the Franco-Chilean Arbitral Tribunal, which, in its decision (page 313), especially referring to the ownership and control of guano found in dispute, used the following language:

The military occupation of an enemy's territory draws with it certain consequences, according to the principles of international law, relative to the public property of the state sovereign of that territory; that one distinguishes in this respect in practice as in doctrine between the movable property of the enemy state, which is considered booty of war, and immovable property, upon which the occupant exercises all the rights of the usufructuary, making the fruits, natural or civil, his own, but that in this case the distinction matters little, because the effects of occupation relative to the rights created by Peru upon the guano would be identical, whether one considered the guano not extracted in the category of movable things, or regarded it as fixed by incorporation or accession to the soil; whereas in effect in the first hypothesis the occupation did not have as a result the turning over immediately to Chile of property in all movable things belonging to Peru in the territory occupied; that Chile acquired solely the right to appropriate them; that up to the moment when it made effective use of this right ownership had not changed; that thus Chile only became proprietor of the beds of guano occupied according to its complete acts of appropriation, Peru remaining meanwhile free to dispose of this guano, and consequently to sell it or to undertake to deliver it; that it is exactly the same in the second hypothesis since then the right of property of Peru over the beds was only limited by the use that Chile made of its rights of usufruct.

**655.** The general in command, on assuming military occupation, is authorized to proclaim martial law, and it was so held in the Dubos case (Boutwell's Report, 93; Moore, 3319); and, as was further held in that case, the law properly applied to aliens, and they were bound to obey its regulations the same as other inhabitants.

This does not, however, authorize the military commander to act in an arbitrary manner, but, he having settled and recognized certain



restrictions to his own authority, as was stated in the same case, and announced the principles and rules of his administration, and the instructions of the government for the army of the United States requiring, whenever feasible, that martial law should be carried out in cases of individual offenders in military courts, it was held by a majority of the commission that he had no power of arbitrary imprisonment, and that an attempt to impose it was a violation as well of his own proclamation as of the rules and articles of war.

The rules and limitations of martial law were very extensively discussed by Commissioner Aldis in the dissenting opinion in this case (Boutwell's Report, 217).

**656.** Under martial law it was held that the military commander had full authority to levy a special assessment on all persons, including foreigners, who might aid the rebellion (Rochereau case, Boutwell's Report, 101; Moore, 3739; Dubois case, Boutwell's Report, 103; Moore, 3742).

Commissions have, however, allowed damages for fines imposed by military authority under circumstances not justifying such action, as was done in the Johnson case (Moore, 2817).

In the Orr & Laubenheimer case (United States *vs.* Nicaragua, Foreign Relations of 1900, 826) the right to take property under martial law and in time of war was recognized, it being held, however, that full compensation "for all damage suffered by private parties must be made."

**657.** A tribunal of the Permanent Court of Arbitration at The Hague, having before it the Casablanca affair, rendered an arbitral sentence on May 22, 1909, in the course of which, having occasion to discuss the effect of military occupation and of a conflict between military and consular authority, it said:

That according to the régime of the capitulations in force in Morocco, German consular authority exercises, as a general rule, exclusive jurisdiction over all German subjects who may be found in this country; that, on the other hand, an army of occupation exercises also, as a general rule, exclusive jurisdiction over all persons belonging to such army; that this right of jurisdiction should be recognized, always as a general rule, even in countries subject to the régime of the capitulations; that in the case where subjects of a power which, in Morocco, takes the benefit of the régime of the capitulations, belong to the army of occupation sent into that country by another power, there arises, by the force of events, a conflict between the two jurisdictions above indicated; that the French government did not make known the composition of the expeditionary force and did not declare that the effect of military occupation modified the exclusive consular jurisdiction flowing from the régime of the capitulations; that, on the other hand, the German government did not protest against the employment in Morocco of the foreign legion

which, as to a certain part, is notoriously composed of German subjects; that it does not belong to this tribunal to express an opinion as to the organization of the foreign legion, or upon its employment in Morocco; that the conflict of the jurisdictions spoken of cannot be decided by an absolute rule which would accord in a general manner preference either to one or the other of the two concurring jurisdictions; that in each particular case it is necessary to take notice of the circumstances of fact which are of a nature to determine the preference; that the jurisdiction of the army of occupation would, in case of conflict, have the preference where the persons belonging to such army have not left the territory under the immediate, firm and effective domination of the armed force; that at the epoch in question the fortified town of Casablanca was under military occupation and guarded by French military forces which constituted its garrison, and were either in the city itself or in the surrounding camps; that under such conditions the deserters of German nationality belonging to the military forces of one of these camps and being within the town limits, remained subject to the exclusive military jurisdiction; that, on the other hand, the question of the respective competence in a country of capitulations of the consular jurisdiction and of the military jurisdiction being very complicated and never having received any express, clear and universally recognized solution, the German consular authority cannot be blamed for having accorded its protection to the above-named deserters who had solicited it; that the German consul at Casablanca did not accord the protection of the consulate to non-German deserters, and that the dragoman of the consulate did not in these respects exceed the limits of his powers; that the fact that the consul signed without reading, a safe-conduct for *six* persons instead of *three*, and omitting information as to the German nationality such as he had himself prescribed, can only be characterized as an unintentional error; that the Moroccan soldier of the consulate in aiding the embarkation of the deserters only acted according to the orders of his superiors, and that on account of his inferior station, no personal responsibility can rest upon him; that the secretary of the consulate intentionally sought to embark deserters of a non-German nationality as enjoying the protection of the consulate; that to this end he, with deliberate intention, caused the consul to sign the safe-conduct mentioned above, and that with the same intention he took measures to conduct to the port, as well as to embark, these deserters; that in acting thus he went beyond the limits of his powers, and committed a grave and manifest violation of his duty; that the deserters of German nationality found themselves at a port under the protection in fact of the German consular authority, and that this protection was not manifestly illegal; that this situation of fact was entitled, so far as possible, to be respected by the French military authorities; that the deserters of German nationality were arrested by this authority, notwithstanding the protestations made in the name of the consulate; that the military authority would have been able to, and consequently should, have limited itself to preventing the embarkation and flight of these deserters, and before proceeding to their arrest and imprisonment to offering to allow to leave them sequestered in the German consulate until the question of competent jurisdiction had been determined; that this manner of proceeding would have been also of a character to maintain the prestige of the consular authority conformably to the common interests of all Europeans living in Morocco; that even if one admits the legality of the arrest, the circumstances did not justify on the part of a French military either a menace made with the aid of a revolver or the continuation of

blows upon a Moroccan soldier of the consulate, even after his resistance had been overcome; as to the other outrages or matters of fact alleged on one part or the other, the course and exact nature of events are impossible to establish; that conformably to what has been said above, the deserters of German nationality should have been sent back to the consulate to restore the condition of fact interfered with by their arrest; that this restitution also would have been desirable with a view to maintaining the consular prestige, but, that in the present state of things, this tribunal being called upon to determine the exact situation of the deserters, there is no longer occasion to direct provisionally and temporarily the return, which should have been effected.

#### RIGHT TO ENFORCE MILITARY SERVICE

658. The right of a government to compel military service from its citizens to the prejudice of aliens is superior, however, to the claims of the alien to obtain the benefit of such services for himself, and such was the holding of Thornton, umpire, in the case of the *Siempre Viva Company* (Moore, 3784), wherein it was claimed that on various occasions Mexican officers, by authority of war, had obliged the workmen at the company's mines to serve in the national guard in which they were enrolled, the umpire remarking:

The war which then existed in the country rendered this step a necessity. It was one of those misfortunes to which natives as well as foreigners were exposed. . . . In the opinion of the umpire, no claim can be made against the Mexican government for losses arising to foreigners out of the legal obligation which bound Mexicans to military service.

A like ruling was made by the same umpire in the *Cole case* (Moore, 3785).

In the *Valentiner case* (Ven. Arb. of 1903, 562), Duffield, umpire of the German-Venezuelan Commission, held Venezuela not liable for the enforced draft, under circumstances of presumed necessity and legality, of laborers employed by the claimant, the consequence of such draft being alleged to be the loss of crops.

## CHAPTER XIV

### MARITIME LAW

#### NATIONAL LAW CONTROLS VESSELS ON HIGH SEAS

**659.** That the national law governs vessels on the high seas was declared by the umpire in the *Creole* case, British-American Commission of 1853 (Report, 244 ; Moore, 4375), he saying that "the *Creole* was on a voyage, sanctioned and protected by the laws of the United States, and by the law of nations." He added in substance that by the law of nations she carried with her, on the high seas at any rate, this law, and that, a mutiny there occurring, all that the courts of a friendly country could do would be to keep in custody the mutineers carried into port, until a conveyance could be found for sending them to their home country. That he was correct in stating in substance that on the high seas merchant vessels constitute detached portions of the state whose flag they bear, and acts thereon are to be adjudged by their national authorities, was also held by Mr. de Martens (*Costa Rica Packet* case, Moore, 4952).

In the *Pelletier* case (Moore, 1773) the arbitrator recognized also the national law as controlling the rights of a vessel, but, as we shall subsequently see, probably carried this doctrine to an unjustifiable extent, applying it in favor of the vessel while in the ports of a friendly nation as well as upon the seas themselves.

#### OWNERSHIP OF VESSELS

**660.** The question as to the method of determining ownership of a vessel came up in the *Montijo* case (Moore, 1434), and the umpire held that he could not "go behind the undoubted fact that the government of the United States considers the *Montijo* as an American ship. On this point it is the sole judge." The ship had an American register, and, such being the case, the question arose as to whether the umpire could investigate as to its real owners, and was decided as indicated.

The same subject was in a measure considered by Judge Raynor, of the Alabama Claims Commission, in the *Texas Star* case (Moore, 2367), he recognizing American ownership in the vessel, which had

assumed a foreign register for the purpose of avoiding capture by the Confederacy, and justified claimants' acceptance of the foreign register for such purpose.

**661.** In the *Alliance* case (Ven. Arb. of 1903, 29 ; Morris's Report, 117), Bainbridge, commissioner, speaking for the commission, gave a judgment in favor of the American claimant, the owner of the *Alliance*, although she carried a Dominican register so as to be permitted to trade along the Dominican coast, and held that, whatever might be said as to the morality of the proceeding, it was not conclusive against the American ownership of the vessel, he regarding custom-house enrollment merely as *prima facie* evidence, and considering that property in a ship was a matter to be proved *in pais* by competent evidence, like any other fact, citing Wharton's International Law Digest, Vol. III, Sec. 410.

#### VESSELS AND MARINERS IN DISTRESS

**662.** That a vessel driven into a foreign port by stress of weather or other unavoidable cause ought not to be subject to customhouse jurisdiction was held by Bates, umpire of the British-American Commission of 1853, in the *Creole* case (Report, 245 ; Moore, 4375), the circumstance in this case being the presence on board of mutineers who were beyond the control of the captain. He said :

These rights, sanctioned by the law of nations — viz., the right to navigate the ocean and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers the laws of her own country — must be respected by all nations, for no independent nation would submit to their violation.

**663.** So likewise the duty of aid and protection in the case of a vessel driven into port through stress of weather was recognized by the umpire of the same commission in his opinion in the *Enterprise* case (Report, 237 ; Moore, 4372), and in the case of the *Hermosa* (Report, 239 ; Moore, 4374), which was that of a wreck, as the result of which slaves held in accordance with the law of the United States were, as he maintained, wrongfully set at liberty by the action of the municipal authorities of Bermuda.

In the latter case, Bates, umpire, after making a reasonable allowance for salvage, as if there had been proper conduct on the part of the authorities at Nassau, awarded the rest of the claim to the insurance companies who had paid for the loss of the vessel.

**664.** The duty of civilized countries to aid mariners in distress was maintained in the Hudson's Bay Company case (British-American

Commission of 1853, Report, 164 ; Moore, 3458), Hornby, British commissioner, speaking for the commission, saying :

Assistance rendered to shipwrecked mariners is in conformity to the established policy of both governments through their consuls and other officers abroad, and in this case the captivity of these men by savages was superadded. The assistance rendered through the agents of this Company, made by request of Americans on the coast, secured the release of these unfortunate men, and I am happy in having the concurrence of my colleague in granting full remuneration for the expenditures incurred in effecting so laudable an object.

So in the case of the *Alliance*, driven into a Venezuelan port by stress of weather, and in a battered and disabled condition (Ven. Arb. of 1903, 29), Venezuela was held responsible for the wrongful detention of the vessel and damages resultant therefrom. The arrest of the vessel was claimed by Venezuela as justified under her customs laws.

#### CLEARANCE OF VESSELS

**665.** We have seen elsewhere, and we now repeat, that a clearance may not be refused to a vessel because the ports to which clearance is desired are in the possession of revolutionists, at any rate if the blockade is only a paper one (Orinoco Asphalt case, Ven. Arb. of 1903, 586 ; Asphalt Company case, Ven. Arb. of 1903, 331).

So also, there being an unjustifiable refusal of clearance of a vessel from a port of Venezuela to a port of French Guiana (Lalanne case, Ven. Arb. of 1903, 501 ; Ballistini case, Ven. Arb. of 1903, 503), awards were given against Venezuela on the opinion of the Venezuelan commissioner, the French commissioner joining in the result.

#### CREDIT OF VESSELS

**666.** Certain rules of maritime law were fully recognized in the case of Raymond (Ven. Arb. of 1903, 250 ; Morris's Report, 527), Bainbridge, speaking for the commission, saying :

The presumption of law is that when advances are made to the captain in a foreign port upon his request for the necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage, or like services rendered to the vessel, they are made upon the credit of the vessel as well as upon that of her owners. It is not necessary to the hypothecation that there should be any express pledge of the vessel, or any stipulation that the credit should be given on her account.

#### CRIME ON HIGH SEAS

**667.** The question as to the nation entitled to try a crime committed on the high seas on board of one of its vessels received the

consideration of Bates, umpire, in the *Creole* case, British-American Commission of 1853 (Report, 244 ; Moore, 4375), he stating :

A vessel navigating the ocean carries with her the laws of her own country, so far as relates to the persons and property on board, and to a certain extent retains those rights even in the ports of the foreign nations she may visit. . . . It is submitted the mutineers could not be tried by the courts of that Island [New Providence], the crime having been committed on the high seas. All that the authorities could lawfully do was to comply with the request of the American consul, and keep the mutineers in custody until a conveyance could be found for sending them to the United States.

#### CRIME IN FOREIGN PORT

668. As has been noted, in the Pelletier case (Moore, 1772), the arbitrator was of the opinion that by the law of nations offenses committed even within a foreign country on board a visiting vessel could be tried only in the courts of the country to which the vessel belonged. This was not the view of Mr. Bayard (Moore, 1797), who quoted from the opinion of Chief Justice Waite in the *Wildenhus* case, 120 U. S., 1, to the effect that "it is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement." It is noteworthy that the award in the Pelletier case was opened for this error and for other reasons, and disregarded (Moore, 1804, 1805).

It will be borne in mind, however, that by comity of nations, as appears under the discussion of the title of "Government," a war vessel carries its own nationality with it even in a foreign port.

#### OWNERS REPRESENT MASTER AND SEAMEN

669. The owners of a ship represent the master and seamen, as was held by Thornton, umpire of the Mexican Commission under the treaty of 1868, in the case of the brig *Emily Banning* (Moore, 1356), he saying that they were "the natural representatives of the master and seamen, and to a certain extent bound to see that they are compensated for injuries done them when in their service."

#### PROTECTION OF FLAG TO SAILORS

670. That seamen engaged in naval and mercantile service are entitled during such service to the protection of the flag under which they serve, and, unless the contrary be expressly proved, are to be considered as citizens of the country of such flag, was the opinion

expressed by Thornton, umpire, in the McCready case (Moore, 2536), who believed that "seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve."

#### UNJUST DETENTION ON SUSPICION

**671.** An award was given by the umpire in the Perry case, Mexican Commission of 1839 (Moore, 4347), for the unjust detention of a vessel on the suspicion of being engaged in smuggling.

#### NO TERRITORIAL SOVEREIGNTY ON HIGH SEAS

**672.** We have seen under the head of "Government" the extent to which a nation may claim dominion over the waters of the ocean. We have found in discussing the question of sovereignty that the war ships of a state would not be permitted to pursue beyond the territorial sea any vessel whose crew was guilty of an illegal act in territorial waters, or on the territory of that state, except it be by stipulated convention (*C. H. White* case, Whaling Claims Arbitration, Foreign Relations of 1902, Appendix I, 462).

The majority of the Fur Seal Arbitral Tribunal decided that under the treaty of 1825 between Great Britain and Russia the Bering Sea was included in the phrase "Pacific Ocean" as therein used; that all rights of Russia as to seal fisheries in the Bering Sea passed to the United States, but that the United States had no right of protection of or property in fur seals frequenting their islands in the Bering Sea where the seals were found outside the ordinary three-mile limit.

#### WRONGFUL SEIZURE AND DETENTION OF VESSELS

**673.** In a large number of cases awards have been granted for the wrongful seizure of vessels; for instance, in the Waydell case (Moore, 3255), Lewenhaupt, umpire, granted an award for action illegally depriving the owners of the vessel of the services of the captain.

In the Orinoco Asphalt Company case (Ven. Arb. of 1903, 586), demurrage was allowed, estimated by the value of the use of the vessel, which might be computed upon the average of net profits on a trip for the season.

In the Driggs case (United States and Venezuelan Commission of 1889, 405) an allowance was made for the detention of a vessel, because of an error committed by the collector in doing what he believed



to be his duty and without an intent to wrong any one. An amount sufficient to make the owner whole was granted. In the *Adams* case, before the Mexican Commission of 1868 (Moore, 3065), demurrage was allowed for delay to enforce wrongful payment of duties.

In the *Lund* case, before the Mexican Commission of 1839 (Moore, 3120), an allowance was made for the detention and feed of mules on board, as well as diminution in their value, for the detention and food of persons held on board, and for the imprisonment of the captain.

In the *Ferrer* case, before the Mexican Commission of 1868 (Moore, 2720), an allowance was made for the value of the cargo at the place of shipment, the cost of transportation, with 10% as profit.

In the *Canada* case, Thornton, arbitrator (Moore, 1747), allowance was made for maintenance and passage home of the crew, as well as for three months' wages, being the amount which all owners of vessels of the nation were bound to pay to seamen discharged abroad.

In the *Potter* case, before the Mexican Commission of 1839 (Moore, 4227), an allowance was made for the detention of the vessel and its enforced employment.

In the case of the brig *Splendid*, before the same commission (Moore, 3714), an allowance was made for its seizure and employment equal to the fair price of the service rendered by the vessel and crew, with interest. In the case of the brig *Hermon* (Moore, 3425), advances having been made for its repair, naval stores, and supplies, an award was given accordingly.

In the case of the *C. H. White* (Whaling Claims Arbitration, Foreign Relations of 1902, Appendix I, 462), the principle of the right of indemnity for loss of catch as an element of damage was recognized.

In the case of the *Canada* (Moore, 1746), the arbitrator refused to allow prospective profits, while Upham, American commissioner, in the case of the brig *Jones*, before the British-American Commission of 1853 (Report, 92; Moore, 3046), considered that "the lowest rule of damages for the seizure of a vessel without probable cause, or color of right, is full compensation for all injury incurred," and the umpire without argument awarded damages.

A number of other cases of this same general nature are considered under the title of "Damages."

674. In the cases of the *British Sceptre* (Reclamaciones Presentadas al Tribunal Anglo-Chileno, Vol. III, 351) and the *British Army* (Ibid., 386) it was held that no responsibility existed for delays in the loading or discharging of cargo when such delay was the consequence of an act of war or of internal political disturbances.

## CHAPTER XV

### PRIZE LAW

#### EFFECT OF JUDGMENTS OF PRIZE COURTS

675. We have had occasion, in considering the jurisdiction of commissions, to define the position of arbitrators with reference to the judgments of courts of prize, particularly as shown by the arbitral board under the seventh article of the Jay Treaty. It nevertheless remains to place under this heading some discussion of the general law of prize and the effect of the judgments of prize courts.

In discussing the subject, the United States and Venezuelan Claims Commission of 1889, in the Corwin (*Mechanic*) case (Report, 119; Moore, 3213), said:

The seizure by the *Santander* of the *Mechanic*, and the sending of her to Puerto Cabello for authoritative decision as to her cargo, under a claim of its being enemy (Spanish) property, and the adjudication there by the Colombian prize court of the question, were, as is conceded, authorized by the law of nations. But it is contended the court found that Soto was a Spaniard, when he was in fact a Mexican, and that its judgment being predicated on that error of fact, is not binding on these companies as respects their demands against the government of the captor. Undoubtedly a wrong done by a government through its prize courts is redressible in a proper case the same as if done through its other courts or agencies. But the wrong must be shown. Although a prize court is summary in proceeding, acting in time of war when impartiality in procedure and decision is not in *practice* generally thought to be attained, yet its judgments are in the eyes of the public law respected much as judgments of municipal courts are. Mr. Wheaton says: "The *theory* of public law treats prize tribunals established by and sitting in the belligerent country exactly as if they were established by and sitting in the neutral country, and as if they always adjudicated conformably to the international law common to both."

676. It was held by Hassaurek, in the Ecuadorian Commission, in the Clark and Danels cases (Moore, 2735):

The title to a prize originally vests in the government represented by the captor. The rights of the captor are subsequently ascertained and fixed by judicial decisions. It is true, as alleged by claimant's counsel, that at the time his prizes were taken away from him he had at least a right of possession to them.

## WHEN VESSELS MAY BE MADE PRIZES

677. A vessel taken before the breaking out of war may not be regarded as a prize, and the commandant acting to the contrary assumes personal responsibility. Such was the decision of the King of the Netherlands, April 13, 1852, in passing upon the case of the ship *Veloz Mariana*, the dispute being between France and Spain. He stated (Moore, 4875; Recueil des Arbitrages, 619) "that the seizure of a vessel previous to the period when a war breaks out cannot be considered as a maritime capture in war; that the reasons which induced the commandant of the *Jean Bart* to take the *Veloz Mariana*, whether justifiable or not, could in no case give to the arrest the character of a capture in war, nor have any other legal consequences than to involve the personal responsibility of the captain of the *Veloz Mariana* and to give rise to a judicial inquiry; that neither could the sequestration of the *Veloz Mariana* in the port of Brest at a time when the war was begun be equivalent, under international law, to a maritime capture."

678. A vessel loading in a port about to be blockaded is entitled to reasonable notice and opportunity to leave, as was held by the British-American Commission as to the *Hiawatha* (Hale's Report, 130; Moore, 3902), in which case the bark had attempted in due time to depart from the blockaded port, but through baffling head winds and the breaking of a towline was unable to reach the sea.

679. A vessel intending to run the blockade is not entitled to formal notice and warning, as was held by the British Commission of 1871 in a number of cases (*Sunbeam* and other vessels, Hale's Report, 127; Moore, 3159). But in the *Nahum Stetson* case, before the Mexican Commission of 1868 (Moore, 3132), where there was a failure to give notice of the blockade, and no evidence of a wrongful intent, the respondent government was held liable.

680. A capture made in neutral waters was held not good prize in the case of the *Sir William Peel* (Hale's Report, 100; Moore, 3935).

## DOCTRINE OF CONTINUOUS VOYAGE

681. In the case of the steamer *Peterhoff* and others (Hale's Report, 136; Moore, 3838) the doctrine of continuous voyage was fully recognized, and all cases based upon its capture were disallowed. It will be remembered that the *Peterhoff* sailed for the mouth of the Rio Grande, her bills of lading specifying their destination as Matamoras, and that her cargo was to be taken from alongside the ship at

the mouth of the Rio Grande. Included in the cargo was a very large amount of military supplies. The contention that the voyage of the vessel was lawful from one neutral port to another, and that her capture was wholly unjustified by any proof of intent to violate the blockade, or of any unlawful conduct in any respect, was disregarded.

The *Springbok* (Hale's Report, 117; Moore, 3928) was captured one hundred and fifty miles east of Nassau, New Providence, was taken into the port of New York, libeled, and condemned as to both vessel and cargo, it being contended that, although bound for Nassau, its cargo should be treated as contraband, since it was to be transhipped to a port in the Confederate States. The trial court condemned both vessel and cargo (Blatchford's Prize Cases, 434-463). On appeal the Supreme Court affirmed the judgment as to the cargo, and reversed it as to the vessel, adjudging restitution (1 Wallace, 1). The commission unanimously disallowed the claim as to the cargo, but awarded the claimant of the vessel \$5065, which Mr. Hale was advised was because of the detention of the vessel from the date of the decree of the district court to the date of her discharge under the decree of the Supreme Court, the latter judgment having established that she should have been discharged by the decree of the district court.

Wherever a vessel was seized as prize, and it was held by the Supreme Court that it should have been discharged by the trial court, damages were allowed for the detention during the time the appeal was pending.

**682.** But where a vessel had sailed from England to Havana with contraband, her port of final destination being New Orleans, which had fallen into the hands of the Union troops before the capture of the *Circassian* on her way to Havana, the capture was held invalid, and an award given (Hale's Report, 141; Moore, 3911).

#### EFFECT OF WRONGFUL SEIZURE ON TITLE

**683.** That property does not change title because of wrongful seizure and capture was the opinion of Upham, American commissioner, speaking for the commission in the Houghton case (British-American Claims Commission of 1853, Report, 161; Moore, 4387), he saying:

The property of which he was divested in no manner passed to those who deprived him of it, and its recapture by a government vessel of the United States did not change the right of ownership, except to the extent of such claim of salvage as should be allowed on this account.

In this case the ship, containing property of a British subject, was seized by a piratical vessel on the high seas, and subsequently captured by a United States cruiser and the ship and property sold, the proceeds going into the United States treasury, subject to certain claims of the captors as established by law.

#### PROBABLE CAUSE

**684.** Probable cause found by the trial court has many times been held to excuse the respondent government from the payment of damages, and this doctrine was recognized in the cases of the *Pacificque* (Hale's Report, 95 ; Moore, 3159) and the brig *Volant* (Hale's Report, 111 ; Moore, 3950) ; in the Bigland case, steamship *Tubal Cain* (Hale's Report, 161 ; Moore, 3793), and by Upham, commissioner, in the case of the brig *Jones* (British-American Claims Commission of 1853, Report, 90, 91 ; Moore, 3046). Resistance to the wrongful arrest of a vessel where the court found that there was no probable cause was, by the same commissioner, in the last-named case held excusable and not a ground for assessing any costs against the vessel, but constituted, if anything, a personal and distinct ground of defense that must be separately prosecuted.

**685.** Discussions as to what constituted or did not constitute probable cause are to be found in Moore, 3815-3837. In the case of the *Nancy*, before the commission under the seventh article of the Jay Treaty, Mr. Gore said :

The belligerent having the right to the property of an enemy, though on board the vessel of a neutral, the neutral is not justified in concealing or destroying the evidence that shall so designate it. If he does either, he interferes with the acknowledged right of the belligerent. But if the neutral has on board his vessel complete and genuine papers which speak clearly as to the property, he conducts himself conformably to the law of nations, and as he interferes with no right of the belligerent in destroying papers that do not relate to vessel and cargo, I see no just reason why he should be put to trouble and expense for such an act.

In the case of the *Sally* (Moore, 3817), there being on board the vessel papers denominated instructions and invoices, containing every material fact which should be contained in a bill of lading, he found that there was nothing suspicious in the want of a bill of lading, and knew of no law of nations that rendered it necessary to the safety of neutral property that there be a bill of lading in the vessel, either according as the terms are generally understood, or according to the particular character of such a document in any one nation.

In the case of the *Sally* (Moore, 3820) Mr. Pinkney considered that the possibility of hostile ownership was not probable cause. There must be an apparently well-founded presumption.

In the case of the *Diana* (Moore, 3827) Mr. Gore considered that the throwing away of letters which might have involved in trouble third persons in France, the vessel captain believing, at the time, that he was being chased by a French privateer, and the letters not having any relation to the vessel or cargo, was an innocent act.

In the same case (Moore, 3832) Mr. Pinkney found that the throwing overboard of immaterial papers was not probable ground for suspicion.

Mr. Trumbull, the fifth commissioner, coincided in these views (Moore, 3832).

## CHAPTER XVI

### INTERNATIONAL COURTS OF INQUIRY

**686.** Before closing our subject it would seem not inappropriate to say a few words with regard to the procedure and practice of international courts of inquiry. The first formal recognition of such courts is to be found in the Hague Convention of 1899 for the Pacific Settlement of International Disputes, which provided (Article 9):

In differences of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the signatory powers recommend that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.

Further articles of the same convention provided that such commissions should be constituted by special agreement defining the facts to be examined, the extent of the commission's powers, the procedure, and that both sides should be heard, and declared that the forms and periods to be observed, if not fixed by convention, should be decided by the commission itself. Failing special provisions otherwise, the commission was to be formed in the same manner as an arbitral court under the same convention. The powers in dispute were to supply the commission as fully as possible with everything needed to bring about an accurate understanding of the facts in question. The commission was to communicate its report, signed by all its members, to the conflicting powers. Such report was to be limited to a statement of facts, not partaking of the character of an arbitral award, and it left the powers in conflict entire freedom as to the effect to be given its findings.

The like convention of 1907 goes much more into detail, but as up to the present time no particular use has been made of its provisions, we do not enlarge upon them.

**687.** The first and only instance of the formation of a commission of inquiry under the Hague Convention was that relating to the incident of the firing of men-of-war of the Russian squadron upon English fishing boats in the North Sea, and generally known as the "Hull incident."

About one o'clock in the morning of October 9, 1904, the Russian admiral, Rojestvensky, while passing a fleet of English fishing vessels, believed his ship about to be attacked by a torpedo boat (in fact, mistaking a fishing steamer for one) and directed fire, with the result that two men were killed and six wounded, while one boat was sunk and five others were injured.

After much correspondence between the Russian and English governments, and interviews of their respective representatives which brought about no arrangement, the French government, through its ambassador at London, proffered its good offices, with the result that a protocol was signed, referring to a commission of inquiry examination into all the facts. By the terms of the protocol the commission was to be and was composed of a British and a Russian naval officer of high rank, like officers, one each, to be named by the French and American governments, and a fifth to be chosen by the four so named, or, in default of agreement, to be selected by the Emperor of Austria. The commission itself chose Admiral Baron Spann of Austria, while Vice Admiral Fournier was selected as presiding officer.

The protocol also provided for the naming by each party of a jurisconsult-assessor and an agent, who by virtue of their offices were authorized in a consultative way to take part in the labors of the commission.

The commission was given power to fix the details of its procedure, and the parties undertook to furnish all necessary information.

Paris was determined upon as the place of meeting, and by the protocol the contracting powers were to be furnished with a report signed by the members of the commission. A majority was given power to express the decisions of the commission. The costs incurred before the commission met were to be borne by the parties making them, and, after its installation, in common by the two governments.

**688.** The rules adopted after consideration of drafts proposed by the English and Russian assessors provided for the creation and duties of a secretary, with assistants representing each government; declared that sessions should be public or private according to their purpose, the public ones being for expositions of facts by the agents; provided for the interrogation of witnesses, the presentation of the final arguments of the agents, and the sessions for the announcement of the conclusions of the commission, with private sessions for deliberations; directed that only those directly connected with the commission should be present at the private sessions; that the commission and attachés should be seated according to a plan attached; that at public



sessions equal privileges should be extended to the press of the two countries and an equal number of places reserved for the press of other countries, with a like number of tickets placed at the disposal of each commissioner ; that stenographic reports should be made and revised by the parties addressing the commission ; that after each session the president and secretary should prepare the minutes to be read at the opening of the following session, corrected, if necessary, signed by the president, the agents, and the secretary, and made in ten originals, one left in the archives of the commission and the others delivered to the commissioners, agents, and assessors ; that the full report of the public sessions should be prepared for the press under the direction of the president after understanding with the commissioners ; that the official language of the commission should be French, and that every document in another language should be translated into French, although the witnesses could testify in the language of their country.

As to the sessions of the commission in the hall of consultation, it was provided that the commission should retire there when they found it expedient, without the presence of other persons than the assessors, but with the power to require the attendance of others to give information or as counsel, and without publicity, decisions to be announced in the hall of meeting.

The agents were authorized to present statements of facts to be examined by the commission, and could be assisted by jurisconsults, counsel, or lawyers, whose names should be previously notified to the commission and approved by it, the statement of facts to be first presented by the British and then by the Russian agent ; which statements, as well as accompanying documents, were to be in writing and deposited simultaneously two days before being read at the public session, and without modification after filing.

The commission was of itself, or on request of the parties, to summon witnesses, each one, before being heard, to declare his name, age, nationality, residence, and profession, and attachment, if any, to the service of the parties, and to be heard on oath or affirmation or upon honor, and the same to be noted in the minutes. Written depositions were to be accepted as documents. Witnesses refusing or unable to attend should depose before competent authorities of their residence upon questions addressed by the commission. The assessors and agents were at full liberty to question the witnesses, but the jurisconsults, counsel, or advocates, only after making their questions known to the president. The stenographic report of each deposition was to be

accepted as part of the official proceedings, translated and signed by the writer, but if he refused or could not sign, the fact should be noted in the minutes. Depositions in other languages were to be translated into French. Witnesses could only be heard once (except with the consent of the commission), save to contradict another witness. Witnesses could assist themselves by notes or documents if necessary. After all means of information were exhausted, the agents were at liberty to state in writing their conclusions and arguments, to be read in public sessions.

689. The proceedings had before the commission followed quite closely the rules we have summarized. It is to be noted, however, that when it was proposed, on behalf of Great Britain, to produce witnesses to describe the firing, before the opening of the "Hull incident," by the Russian vessel *Kamtchatka* upon the Swedish steamer *Aldebaron*, believed to be a torpedo boat, the Russian agent made reserves which he considered necessary because such event preceded and formed no part of the "Hull incident." To this the British agent responded, in effect, that the Russian vessel believing itself attacked, its captain so telegraphed by wireless to the admiral, whence resulted certain instructions by him to the other cruisers of the fleet. The testimony was by order of the commission received.

Later a question arose as to the reception of articles from the press, touching opinions therein expressed, and the commission struck from its records extracts from newspapers relating to the state of public opinion, as not comporting with the elevated purpose of the commission.

The conclusions of the commission, relating entirely to questions of fact and presenting nothing affecting any point of law, we do not discuss.

## APPENDIX A

### RULES GOVERNING AMERICAN CLAIMS AGAINST FOREIGN GOVERNMENTS

Citizens of the United States having claims against foreign governments, not founded on contract, in the prosecution of which they may desire the assistance of the Department of State, should forward to the Department statements of the same, under oath, accompanied by the proper proof.

The following rules, which are substantially those which have been adopted by commissions organized under conventions between the United States and foreign governments for the adjustment of claims, are published for the information of citizens of the United States having claims against foreign governments of the character indicated in the above notification; and they are advised to conform as nearly as possible to these rules in preparing and forwarding their papers to the Department of State.

Each claimant should file a memorial, *in triplicate*, properly dated, setting forth minutely and particularly the facts and circumstances from which the right to prefer such claim is derived by the claimant. This memorial should be verified by his or her oath or affirmation.

All subsequent communications to the Department in the nature of statements of fact, arguments, or briefs should likewise be furnished *in triplicate*.

The memorial and all the accompanying papers should have a margin of at least one inch on each side of the page, so as to admit of their being bound in volumes for preservation and convenient reference; and the pages should succeed each other, like those of a book, and be readable without inverting them.

When any of the papers mentioned in rule 11 are known to have been already furnished to the Department by other claimants, it will be unnecessary to repeat them in a subsequent memorial. A particular description, with a reference to the date under which they were previously transmitted, is sufficient.

Nor is it necessary, when it is alleged that several vessels have been captured by the same cruiser, to repeat in each memorial the circumstances in respect to the equipment, arming, manning, flag, etc., of such cruiser, which are relied upon as the evidence of the responsibility of a foreign government for its alleged tortious acts. A simple reference to and adoption of one memorial in which such facts have been fully stated will suffice.

It is proper that the interposition of this Government with the foreign government against which the claim is presented should be requested in express terms, to avoid a possible objection to the jurisdiction of a future commission on the ground of the generality of the claim.

Claims of citizens against the Government of the United States are not generally under the cognizance of this Department. They are usually subjects for the consideration of some other department, or of the Court of Claims, or for an appeal to Congress.

## RULES

In every memorial should be set forth:

1. The amount of the claim; the time when and place where it arose; the kind or kinds and amount of property lost or injured; the facts and circumstances attending the loss or injury out of which the claim arises; the principles and causes which lie at the foundation of the claim.

2. For and in behalf of whom the claim is preferred, giving Christian name and surname of each in full.

3. Whether the claimant is now a citizen of the United States, and, if so, whether he is a native or naturalized citizen and where is now his domicile; and, if he claims in his own right, then whether he was a citizen when the claim had its origin and where was then his domicile; and, if he claims in the right of another, then whether such other was a citizen when the claim had its origin and where was then and where is now his domicile; and if, in either case, the domicile of the claimant at the time the claim had its origin was in any foreign country, then whether such claimant was then a subject of the government of such country or had taken any oath of allegiance thereto.

4. Whether the entire amount of the claim does now, and did at the time when it had its origin, belong solely and absolutely to the claimant; and, if any other person is or has been interested therein, or in any part thereof, then who is such other person and what is or was the nature and extent of his interest; and how, when, and by what means and for what considerations the transfer of rights or interests, if any such was made, took place between the parties.

5. Whether the claimant, or any other who may at any time have been entitled to the amount claimed, or any part thereof, has ever received any, and, if any, what, sum of money or other equivalent or indemnification for the whole or any part of the loss or injury upon which the claim is founded; and, if so, when and from whom the same was received.

6. All testimony should be in writing, and upon oath or affirmation, duly administered according to the laws of the place where the same is taken, by a magistrate or other person competent by such laws to take depositions, having no interest in the claim to which the testimony relates, and not being

the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant or deponent, if known to such magistrate or other person authorized to take such testimony, should be certified by him ; and, if not known, should be certified on the same paper upon oath by some other person known to such magistrate, having no interest in such claim and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition should be reduced to writing by the person taking the same, or by some person in his presence having no interest, and not being the agent or attorney of any person having an interest in the claim, and should be carefully read to the deponent by the magistrate before being signed by him, and this should be certified.

7. Depositions taken in any city, port, or place without the limits of the United States may be taken before any consul or other public civil officer of the United States resident in such city, port, or place, having no interest, and not being agent or attorney of any person having an interest in the claim to which the testimony so taken relates. In all other cases, whether in the United States or in any foreign place, the right of the person taking the deposition to administer oaths by the laws of the place must be verified.

8. Every affiant or deponent should state in his deposition his age, place of birth, residence, and occupation, and where was his residence and what was his occupation at the time the events took place in regard to which he deposes ; and must also state if he have any, and, if any, what, interest in the claim to support which his testimony is taken ; and, if he have any contingent interest in the same, to what extent, and upon the happening of what event, he will be entitled to receive any part of the sum which may be awarded. He should also state whether he be the agent or attorney of the claimant or of any person having an interest in the claim.

9. Original papers exhibited in proof should be verified as originals by the oath of a witness, whose credibility must be certified as required in the sixth of these rules ; but, when the fact is within the exclusive knowledge of the claimant, it may be verified by his own oath or affirmation. Papers in the handwriting of any one who is deceased or whose residence is unknown to the claimant may be verified by proof of such handwriting and of the death of the party or his removal to places unknown.

10. All testimony taken in any foreign language and all papers and documents in any foreign language which may be exhibited in proof should be accompanied by a translation of the same into the English language.

11. When the claim arises from the seizure or loss of any ship or vessel, or the cargo of any ship or vessel, a certified copy of the enrollment or registry of such ship or vessel should be produced, together with the original clearance, manifests, and all other papers and documents required by the laws of the United States which she possessed on her last voyage from the United States, when the same are in the possession of the claimant or can be obtained by him ; and, when not, certified copies of the same should be

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produced, together with his oath or affirmation that the originals are not in his possession and cannot be obtained by him.

12. In all cases where property of any description for the seizure or loss of which a claim has been presented was insured at the time of such seizure or loss, the original policy of insurance, or a certified copy thereof, should be produced.

13. If the claimant be a naturalized citizen of the United States, a copy of the record of his naturalization, duly certified, should be produced.

14. Documentary proof should be authenticated by proper certificates or by the oath of a witness.

15. If the claimant shall have employed counsel, the name of such counsel should, with his address, be signed to the memorial and entered upon the record, so that all necessary notices may be addressed to such counsel or agent respecting the case.

DEPARTMENT OF STATE,

Washington, March 5, 1906.

## APPENDIX B

### CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

His Majesty the German Emperor, King of Prussia; the President of the United States of America; the President of the Argentine Republic; His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary; His Majesty the King of the Belgians; the President of the Republic of Bolivia; the President of the Republic of the United States of Brazil; His Royal Highness the Prince of Bulgaria; the President of the Republic of Chile; His Majesty the Emperor of China; the President of the Republic of Colombia; the Provisional Governor of the Republic of Cuba; His Majesty the King of Denmark; the President of the Dominican Republic; the President of the Republic of Ecuador; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the King of the Hellenes; the President of the Republic of Guatemala; the President of the Republic of Haiti; His Majesty the King of Italy; His Majesty the Emperor of Japan; His Royal Highness the Grand Duke of Luxemburg, Duke of Nassau; the President of the United States of Mexico; His Royal Highness the Prince of Montenegro; His Majesty the King of Norway; the President of the Republic of Panama; the President of the Republic of Paraguay; Her Majesty the Queen of the Netherlands; the President of the Republic of Peru; His Imperial Majesty the Shah of Persia; His Majesty the King of Portugal and of the Algarves, etc.; His Majesty the King of Roumania; His Majesty the Emperor of All the Russias; the President of the Republic of Salvador; His Majesty the King of Servia; His Majesty the King of Siam; His Majesty the King of Sweden; the Swiss Federal Council; His Majesty the Emperor of the Ottomans; the President of the Oriental Republic of Uruguay; the President of the United States of Venezuela:

Animated by the sincere desire to work for the maintenance of general peace;

Resolved to promote by all the efforts in their power the friendly settlement of international disputes;

Recognizing the solidarity uniting the members of the society of civilized nations ;

Desirous of extending the empire of law and of strengthening the appreciation of international justice ;

Convinced that the permanent institution of a tribunal of arbitration accessible to all, in the midst of independent powers, will contribute effectively to this result ;

Having regard to the advantages attending the general and regular organization of the procedure of arbitration ;

Sharing the opinion of the august initiator of the International Peace Conference that it is expedient to record in an international agreement the principles of equity and right on which are based the security of states and the welfare of peoples ;

Being desirous, with this object, of insuring the better working in practice of commissions of inquiry and tribunals of arbitration, and of facilitating recourse to arbitration in cases which allow of a summary procedure ;

Have deemed it necessary to revise in certain particulars and to complete the work of the First Peace Conference for the Pacific Settlement of International Disputes ;

The high contracting parties have resolved to conclude a new convention for this purpose, and have appointed the following as their plenipotentiaries :  
[Here follow the names of plenipotentiaries.]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following :

## PART I. THE MAINTENANCE OF GENERAL PEACE

ARTICLE 1. With a view to obviating, as far as possible, recourse to force in the relations between states, the contracting powers agree to use their best efforts to insure the pacific settlement of international differences.

## PART II. GOOD OFFICES AND MEDIATION

ART. 2. In case of serious disagreement or dispute, before an appeal to arms, the contracting powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly powers.

ART. 3. Independently of this recourse, the contracting powers deem it expedient and desirable that one or more powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the states at variance.

Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.



ART. 4. The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the states at variance.

ART. 5. The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

ART. 6. Good offices and mediation undertaken either at the request of the parties in dispute or on the initiative of powers strangers to the dispute have exclusively the character of advice, and never have binding force.

ART. 7. The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If it takes place after the commencement of hostilities, the military operations in progress are not interrupted in the absence of an agreement to the contrary.

ART. 8. The contracting powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form :

In case of a serious difference endangering peace, the states at variance choose respectively a power, to which they intrust the mission of entering into direct communication with the power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the states in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating powers, which must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these powers are charged with the joint task of taking advantage of any opportunity to restore peace.

### PART III. INTERNATIONAL COMMISSIONS OF INQUIRY

ART. 9. In disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the contracting powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

ART. 10. International commissions of inquiry are constituted by special agreement between the parties in dispute.

The inquiry convention defines the facts to be examined ; it determines the mode and time in which the commission is to be formed and the extent of the powers of the commissioners.

It also determines, if there is need, where the commission is to sit, and

whether it may remove to another place, the language the commission shall use and the languages the use of which shall be authorized before it, as well as the date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed.

If the parties consider it necessary to appoint assessors, the convention of inquiry shall determine the mode of their selection and the extent of their powers.

ART. 11. If the inquiry convention has not determined where the commission is to sit, it will sit at The Hague.

The place of meeting, once fixed, cannot be altered by the commission except with the assent of the parties.

If the inquiry convention has not determined what languages are to be employed, the question shall be decided by the commission.

ART. 12. Unless an undertaking is made to the contrary, commissions of inquiry shall be formed in the manner determined by Articles 45 and 57 of the present convention.

ART. 13. Should one of the commissioners or one of the assessors, should there be any, either die, or resign, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him.

ART. 14. The parties are entitled to appoint special agents to attend the commission of inquiry, whose duty it is to represent them and to act as intermediaries between them and the commission.

They are further authorized to engage counsel or advocates, appointed by themselves, to state their case and uphold their interests before the commission.

ART. 15. The international bureau of the Permanent Court of Arbitration acts as registry for the commissions which sit at The Hague, and shall place its offices and staff at the disposal of the contracting powers for the use of the commission of inquiry.

ART. 16. If the commission meets elsewhere than at The Hague, it appoints a secretary general, whose office serves as registry.

It is the function of the registry, under the control of the president, to make the necessary arrangements for the sittings of the commission, the preparation of the minutes, and, while the inquiry lasts, for the charge of the archives, which shall subsequently be transferred to the international bureau at The Hague.

ART. 17. In order to facilitate the constitution and working of commissions of inquiry, the contracting powers recommend the following rules, which shall be applicable to the inquiry procedure in so far as the parties do not adopt other rules.

ART. 18. The commission shall settle the details of the procedure not covered by the special inquiry convention or the present convention, and shall arrange all the formalities required for dealing with the evidence.

ART. 19. On the inquiry both sides must be heard.

At the dates fixed, each party communicates to the commission and to the other party the statements of facts, if any, and, in all cases, the instruments, papers, and documents which it considers useful for ascertaining the truth, as well as the list of witnesses and experts whose evidence it wishes to be heard.

ART. 20. The commission is entitled, with the assent of the powers, to move temporarily to any place where it considers it may be useful to have recourse to this means of inquiry or to send one or more of its members. Permission must be obtained from the state on whose territory it is proposed to hold the inquiry.

ART. 21. Every investigation, and every examination of a locality, must be made in the presence of the agents and counsel of the parties or after they have been duly summoned.

ART. 22. The commission is entitled to ask from either party for such explanations and information as it considers necessary.

ART. 23. The parties undertake to supply the commission of inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with, and to accurately understand, the facts in question.

They undertake to make use of the means at their disposal, under their municipal law, to insure the appearance of the witnesses or experts who are in their territory and have been summoned before the commission.

If the witnesses or experts are unable to appear before the commission, the parties will arrange for their evidence to be taken before the qualified officials of their own country.

ART. 24. For all notices to be served by the commission in the territory of a third contracting power, the commission shall apply direct to the government of the said power. The same rule applies in the case of steps being taken on the spot to procure evidence.

The requests for this purpose are to be executed so far as the means at the disposal of the power applied to under its municipal law allow. They cannot be rejected unless the power in question considers they are calculated to impair its sovereign rights or its safety.

The commission will equally be always entitled to act through the power on whose territory it sits.

ART. 25. The witnesses and experts are summoned on the request of the parties or by the commission of its own motion, and, in every case, through the government of the state in whose territory they are.

The witnesses are heard in succession and separately, in the presence of the agents and counsel, and in the order fixed by the commission.

ART. 26. The examination of witnesses is conducted by the president.

The members of the commission may, however, put to each witness questions which they consider likely to throw light on and complete his evidence, or get information on any point concerning the witness within the limits of what is necessary in order to get at the truth.

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The agents and counsel of the parties may not interrupt the witness when he is making his statement, nor put any direct question to him, but they may ask the president to put such additional questions to the witness as they think expedient.

ART. 27. The witness must give his evidence without being allowed to read any written draft. He may, however, be permitted by the president to consult notes or documents if the nature of the facts referred to necessitates their employment.

ART. 28. A minute of the evidence of the witness is drawn up forthwith and read to the witness. The latter may make such alterations and additions as he thinks necessary, which will be recorded at the end of his statement.

When the whole of his statement has been read to the witness, he is asked to sign it.

ART. 29. The agents are authorized, in the course of or at the close of the inquiry, to present in writing to the commission and to the other party such statements, requisitions, or summaries of the facts as they consider useful for ascertaining the truth.

ART. 30. The commission considers its decisions in private and the proceedings are secret.

All questions are decided by a majority of the members of the commission.

If a member declines to vote, the fact must be recorded in the minutes.

ART. 31. The sittings of the commission are not public, nor the minutes and documents connected with the inquiry published except in virtue of a decision of the commission taken with the consent of the parties.

ART. 32. After the parties have presented all the explanations and evidence, and the witnesses have all been heard, the president declares the inquiry terminated, and the commission adjourns to deliberate and to draw up its report.

ART. 33. The report is signed by all the members of the commission.

If one of the members refuses to sign, the fact is mentioned; but the validity of the report is not affected.

ART. 34. The report of the commission is read at a public sitting, the agents and counsel of the parties being present or duly summoned.

A copy of the report is given to each party.

ART. 35. The report of the commission is limited to a statement of facts, and has in no way the character of an award. It leaves to the parties entire freedom as to the effect to be given to the statement.

ART. 36. Each party pays its own expenses and an equal share of the expenses incurred by the commission.

## PART IV. INTERNATIONAL ARBITRATION

CHAPTER I. *The system of arbitration*

ART. 37. International arbitration has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for law.

Recourse to arbitration implies an engagement to submit in good faith to the award.

ART. 38. In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the contracting powers as the most effective, and, at the same time, the most equitable, means of settling disputes which diplomacy has failed to settle.

Consequently, it would be desirable that, in disputes about the above-mentioned questions, the contracting powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit.

ART. 39. The arbitration convention is concluded for questions already existing or for questions which may arise eventually.

It may embrace any dispute or only disputes of a certain category.

ART. 40. Independently of general or private treaties expressly stipulating recourse to arbitration as obligatory on the contracting powers, the said powers reserve to themselves the right of concluding new agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider it possible to submit to it.

CHAPTER II. *The permanent court of arbitration*

ART. 41. With the object of facilitating an immediate recourse to arbitration, for international differences which it has not been possible to settle by diplomacy, the contracting powers undertake to maintain the Permanent Court of Arbitration, as established by the First Peace Conference, accessible at all times, and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present convention.

ART. 42. The Permanent Court is competent for all arbitration cases, unless the parties agree to institute a special tribunal.

ART. 43. The Permanent Court sits at The Hague.

An international bureau serves as registry for the court. It is the channel for communications relative to the meetings of the court; it has charge of the archives and conducts all the administrative business.

The contracting powers undertake to communicate to the bureau, as soon as possible, a certified copy of any conditions of arbitration arrived at between them, and of any award concerning them delivered by a special tribunal.

They likewise undertake to communicate to the bureau the laws, regulations, and documents eventually showing the execution of the awards given by the court.

ART. 44. Each contracting power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator.

The persons thus selected are inscribed, as members of the court, in a list which shall be notified to all the contracting powers by the bureau.

Any alteration in the list of arbitrators is brought by the bureau to the knowledge of the contracting powers.

Two or more powers may agree on the selection in common of one or more members.

The same person can be selected by different powers.

The members of the court are appointed for a term of six years. These appointments are renewable.

Should a member of the court die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case the appointment is made for a fresh period of six years.

ART. 45. When the contracting powers wish to have recourse to the Permanent Court for the settlement of a difference which has arisen between them, the arbitrators called upon to form the tribunal with jurisdiction to decide this difference must be chosen from the general list of members of the court.

Failing the direct agreement of the parties on the composition of the arbitration tribunal, the following course shall be pursued:

Each party appoints two arbitrators, of whom one only can be its national or chosen from among the persons selected by it as members of the Permanent Court. These arbitrators together choose an umpire.

If the votes are equally divided, the choice of the umpire is intrusted to a third power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different power, and the choice of the umpire is made in concert by the powers thus selected.

If, within two months' time, these two powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be umpire.

ART. 46. The tribunal being thus composed, the parties notify to the bureau their determination to have recourse to the court, the text of their *Compromis*,<sup>1</sup> and the names of the arbitrators.

The bureau communicates without delay to each arbitrator the *Compromis* and the names of the other members of the tribunal.

The tribunal assembles at the date fixed by the parties. The bureau makes the necessary arrangements for the meeting.

<sup>1</sup> The preliminary agreement in an international arbitration defining the point at issue and arranging the procedure to be followed, sometimes used as equivalent to protocol.

The members of the tribunal, in the exercise of their duties and out of their own country, enjoy diplomatic privileges and immunities.

ART. 47. The bureau is authorized to place its offices and staff at the disposal of the contracting powers for the use of any special board of arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between noncontracting powers or between contracting powers and noncontracting powers, if the parties are agreed on recourse to this tribunal.

ART. 48. The contracting powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

In case of dispute between two powers, one of them can always address to the international bureau a note containing a declaration that it would be ready to submit the dispute to arbitration.

The bureau must at once inform the other power of the declaration.

ART. 49. The permanent administrative council, composed of the diplomatic representatives of the contracting powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as president, is charged with the direction and control of the international bureau.

The council settles its rules of procedure and all other necessary regulations.

It decides all questions of administration which may arise with regard to the operations of the court.

It has entire control over the appointment, suspension, or dismissal of the officials and employes of the bureau.

It fixes the payments and salaries, and controls the general expenditure.

At meetings duly summoned the presence of nine members is sufficient to render valid the discussions of the council. The decisions are taken by a majority of votes.

The council communicates to the contracting powers without delay the regulations adopted by it. It furnishes them with an annual report on the labors of the court, the working of the administration, and the expenditure. The report likewise contains a résumé of what is important in the documents communicated to the bureau by the powers in virtue of Article 43, paragraphs 3 and 4.

ART. 50. The expenses of the bureau shall be borne by the contracting powers in the proportion fixed for the international bureau of the Universal Postal Union.

The expenses to be charged to the adhering powers shall be reckoned from the date on which their adhesion comes into force.

CHAPTER III. *Arbitration procedure*

ART. 51. With a view to encouraging the development of arbitration the contracting powers have agreed on the following rules, which are applicable to arbitration procedure, unless other rules have been agreed on by the parties.

ART. 52. The powers which have recourse to arbitration sign a *Compromis*, in which the subject of the dispute is clearly defined, the time allowed for appointing arbitrators, the form, order, and time in which the communication referred to in Article 63 must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.

The *Compromis* likewise defines, if there is occasion, the manner of appointing arbitrators, any special powers which may eventually belong to the tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

ART. 53. The Permanent Court is competent to settle the *Compromis*, if the parties are agreed to have recourse to it for the purpose.

It is similarly competent, even if the request is only made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of :

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present convention has come into force, and providing for a *Compromis* in all disputes and not either explicitly or implicitly excluding the settlement of the *Compromis* from the competence of the court. Recourse cannot, however, be had to the court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one power by another power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *Compromis* should be settled in some other way.

ART. 54. In the cases contemplated in the preceding article, the *Compromis* shall be settled by a commission consisting of five members selected in the manner arranged for in Article 45, paragraphs 3 to 6.

The fifth member is president of the commission *ex officio*.

ART. 55. The duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present convention.

Failing the constitution of the tribunal by direct agreement between the parties, the course referred to in Article 45, paragraphs 3 to 6, is followed.



ART. 56. When a sovereign or the chief of a state is chosen as arbitrator, the arbitration procedure is settled by him.

ART. 57. The umpire is president of the tribunal *ex officio*.

When the tribunal does not include an umpire, it appoints its own president.

ART. 58. When the *Compromis* is settled by a commission, as contemplated in Article 54, and in the absence of an agreement to the contrary, the commission itself shall form the arbitration tribunal.

ART. 59. Should one of the arbitrators either die, retire, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him.

ART. 60. The tribunal sits at The Hague, unless some other place is selected by the parties.

The tribunal can only sit in the territory of a third power with the latter's consent.

The place of meeting once fixed cannot be altered by the tribunal, except with the consent of the parties.

ART. 61. If the question as to what languages are to be used has not been settled by the *Compromis*, it shall be decided by the tribunal.

ART. 62. The parties are entitled to appoint special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

They are further authorized to retain, for the defense of their rights and interests before the tribunal, counsel or advocates appointed by themselves for this purpose.

The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the power which appointed them members of the court.

ART. 63. As a general rule, arbitration procedure comprises two distinct phases: pleadings and oral discussions.

The pleadings consist in the communication, by the respective agents to the members of the tribunal and the opposite party, of cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents called for in the case. This communication shall be made either directly or through the intermediary of the international bureau, in the order and within the time fixed by the *Compromis*.

The time fixed by the *Compromis* may be extended by mutual agreement by the parties, or by the tribunal when the latter considers it necessary for the purpose of reaching a just decision.

The discussions consist in the oral development, before the tribunal, of the arguments of the parties.

ART. 64. A certified copy of every document produced by one party must be communicated to the other party.

ART. 65. Unless special circumstances arise, the tribunal does not meet until the pleadings are closed.

ART. 66. The discussions are under the control of the president.

They are only public if it be so decided by the tribunal, with the assent of the parties.

They are recorded in minutes drawn up by the secretaries appointed by the president. These minutes are signed by the president and by one of the secretaries, and alone have an authentic character.

ART. 67. After the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

ART. 68. The tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party.

ART. 69. The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal the tribunal takes note of it.

ART. 70. The agents and the counsel of the parties are authorized to present orally to the tribunal all the arguments they may consider expedient in defense of their case.

ART. 71. They are entitled to raise objections and points. The decisions of the tribunal on these points are final and cannot form the subject of any subsequent discussion.

ART. 72. The members of the tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points.

Neither the questions put, nor the remarks made by members of the tribunal in the course of the discussions, can be regarded as an expression of opinion by the tribunal in general or by its members in particular.

ART. 73. The tribunal is authorized to declare its competence in interpreting the *Compromis*, as well as the other treaties which may be invoked, and in applying the principles of law.

ART. 74. The tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, order, and time in which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence.

ART. 75. The parties undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the case.

ART. 76. For all notices which the tribunal has to serve in the territory of a third contracting power, the tribunal shall apply direct to the government of that power. The same rule applies in the case of steps being taken to procure evidence on the spot.

The requests for this purpose are to be executed as far as the means at the disposal of the power applied to under its municipal law allow. They cannot be rejected unless the power in question considers them calculated to impair its own sovereign rights or its safety.

The court will equally be always entitled to act through the power on whose territory it sits.

ART. 77. When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case the president shall declare the discussion closed.

ART. 78. The tribunal considers its decisions in private and the proceedings remain secret.

All questions are decided by a majority of the members of the tribunal.

ART. 79. The award must give the reasons on which it is based. It contains the names of the arbitrators; it is signed by the president and registrar or by the secretary acting as registrar.

ART. 80. The award is read out in public sitting, the agents and counsel of the parties being present or duly summoned to attend.

ART. 81. The award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal.

ART. 82. Any dispute arising between the parties as to the interpretation and execution of the award shall, in the absence of an agreement to the contrary, be submitted to the tribunal which pronounced it.

ART. 83. The parties can reserve in the *Compromis* the right to demand the revision of the award.

In this case and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the award and which was unknown to the tribunal and to the party which demanded the revision at the time the discussion was closed.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The *Compromis* fixes the period within which the demand for revision must be made.

ART. 84. The award is not binding except on the parties in dispute.

When it concerns the interpretation of a convention to which powers other than those in dispute are parties, they shall inform all the signatory powers in good time. Each of these powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

ART. 85. Each party pays its own expenses and an equal share of the expenses of the tribunal.

#### CHAPTER IV. *Arbitration by summary procedure*

ART. 86. With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the contracting powers adopt the following rules, which shall be observed in the absence of

other arrangements and subject to the reservation that the provisions of Chapter III apply so far as may be.

ART. 87. Each of the parties in dispute appoints an arbitrator. The two arbitrators thus selected choose an umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the members of the Permanent Court exclusive of the members appointed by either of the parties and not being nationals of either of them; which of the candidates thus proposed shall be the umpire is determined by lot.

The umpire presides over the tribunal, which gives its decisions by a majority of votes.

ART. 88. In the absence of any previous agreement the tribunal, as soon as it is formed, settles the time within which the two parties must submit their respective cases to it.

ART. 89. Each party is represented before the tribunal by an agent, who serves as intermediary between the tribunal and the government who appointed him.

ART. 90. The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts should be called. The tribunal has, for its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in court it may consider useful.

#### PART V. FINAL PROVISIONS

ART. 91. The present convention, duly ratified, shall replace, as between the contracting powers, the Convention for the Pacific Settlement of International Disputes of the 29th July, 1899.

ART. 92. The present convention shall be ratified as soon as possible. The ratifications shall be deposited at The Hague.

The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the representatives of the powers which take part therein and by the Netherland Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherland government and accompanied by the instrument of ratification.

A duly certified copy of the *procès-verbal* relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, and of the instruments of ratification, shall be immediately sent by the Netherland government, through the diplomatic channel, to the powers invited to the Second Peace Conference, as well as to those powers which have adhered to the convention. In the cases contemplated in the preceding paragraph, the said government shall at the same time inform the powers of the date on which it received the notification.

ART. 93. Non-signatory powers which have been invited to the Second Peace Conference may adhere to the present convention.

The power which desires to adhere notifies its intention in writing to the Netherland government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said government.

This government shall immediately forward to all the other powers invited to the Second Peace Conference a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

ART. 94. The conditions on which the powers which have not been invited to the Second Peace Conference may adhere to the present convention shall form the subject of a subsequent agreement between the contracting powers.

ART. 95. The present convention shall take effect, in the case of the powers which were not a party to the first deposit of ratifications, sixty days after the date of the *procès-verbal* of this deposit, and, in the case of the powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherland government.

ART. 96. In the event of one of the contracting parties wishing to denounce the present convention, the denunciation shall be notified in writing to the Netherland government, which shall immediately communicate a duly certified copy of the notification to all the other powers informing them of the date on which it was received.

The denunciation shall only have effect in regard to the notifying power, and one year after the notification has reached the Netherland government.

ART. 97. A register kept by the Netherland Minister for Foreign Affairs shall give the date of the deposit of ratifications effected in virtue of Article 92, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 93, paragraph 2) or of denunciation (Article 96, paragraph 1) have been received.

Each contracting power is entitled to have access to this register and to be supplied with duly certified extracts from it.

In faith whereof the plenipotentiaries have appended their signatures to the present convention.

Done at The Hague, the 18th October, 1907, in a single copy, which shall remain deposited in the archives of the Netherland government, and duly certified copies of which shall be sent, through the diplomatic channel, to the contracting powers.

[Here follow signatures.]



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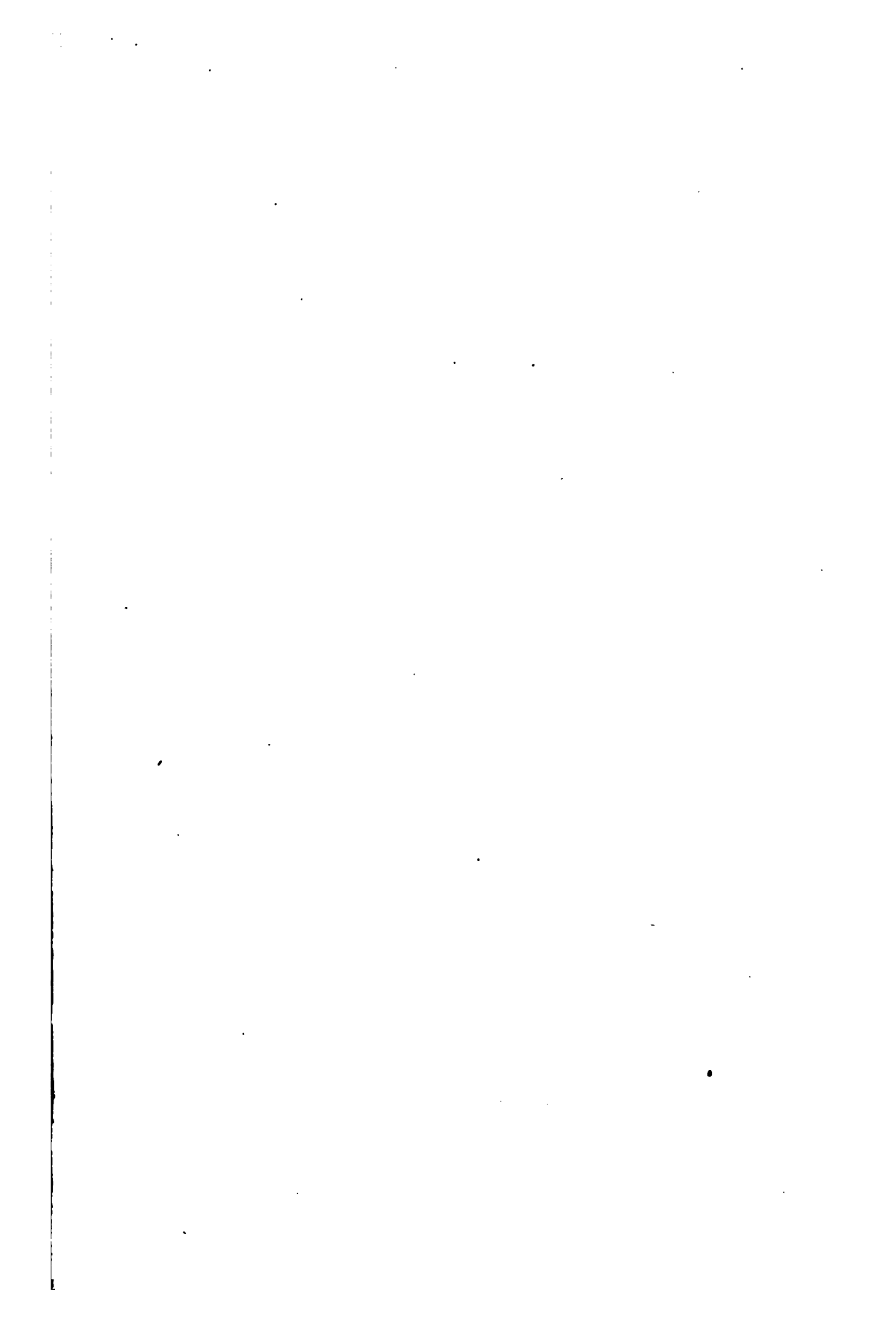
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